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FEDERAL COMMUNICATIONS COMMISSION

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*Sherrie P. Marshall

**Andrew C. Barrett

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*Commissioner Marshall sworn in on August 21, 1989.

**Commissioner Barrett sworn in on September 8, 1989.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PRESTWOOD
COMMUNICATIONS

and File No. 22588-CD-AL-89

METROLINK II, INC.

For consent to assignment of licenses
for Stations KWU436, KWU205, KIE960,
KIG844 and KQZ721 in the Public Land
Mobile Service at various locations
within South Carolina and Georgia

MEMORANDUM OPINION AND ORDER

Adopted: August 30, 1989; Released: September 11, 1989

By the Chief, Mobile Services Division:

1. Before us is an application to assign certain licenses of Prestwood Communications (Prestwood) to Metrolink II, Inc. (Metrolink) (collectively, "applicants"). The assignment is challenged by Porta-Phone, Inc. and Portable Telephone Communications, Inc. ("petitioners"), who request that the Commission defer action on the captioned application pending resolution of the *Amended Formal Complaint and Request for Order to Show Cause*, File Nos. E-89-71 through E-89-74 (" *Complaint* ").

2. Petitioners argue that "principals and affiliates" of Metrolink have not complied with the terms and conditions of some of their licenses, and that they are guilty of lack of candor, misrepresentation, and other character issues which would disqualify them from holding a radio station license. Petitioners offer no support for their argument other than a copy of the *Complaint*, which they incorporate by reference in their petition. In response, applicants point out that Metrolink itself is not the subject of a complaint, nor are any of its licensed stations. The *Complaint* concerns, in part, actions of third-party companies in which a 50 percent shareholder of Metrolink, Mr. Farnell O'Quinn, holds partial interests. Applicants argue that the Commission's policy is not to defer consideration of assignment applications pending allegations of misconduct against licensees not involved in the assignment. Moreover, applicants argue, the petitioners have not alleged, nor do they have, standing in this matter.[1] In any event, applicants have amended the captioned application to reflect the fact that Mr. O'Quinn's 50% shareholder interest has been transferred to Mr. Roger H. Henry, who originally held a 50% shareholder interest, and who now owns all the outstanding stock of Metrolink. Mr. O'Quinn has also resigned his position as an officer and director of Metrolink.

Discussion

3. Applicants are correct that a station assignment normally will not be delayed pending resolution of a complaint against one of the parties. *See, e.g., Advanced Mobile Phone Service, Inc. (Chicago)*, 91 F.C.C.2d 512, 520, n. 19 (1982) (*AMPS Chicago); Taft Broadcasting Corporation*, 76 F.C.C.2d 45, 49 (1980) (*Taft)*. In *Taft*, a case decided under the Commission's mass media rules, the Commission noted that its 1973 policy statement on basic qualifications for broadcast applicants stated that "[a]ction on applications . . . to acquire, either by assignment or transfer of control, existing facilities will generally be deferred where, with respect to the . . . prospective purchaser . . . there are unresolved basic character qualifications questions included as part of . a pending criminal proceeding involving a felony or one where the alleged criminal misconduct involves moral turpitude." Action on an application would also be deferred only if the Commission could not find it in the public interest to transfer the license conditioned on the outcome of a proceeding to determine the existence of wrongdoing. Otherwise, the transfer would go forward subject to such a condition.

4. Petitioners' complaint does not make a showing sufficient to justify deferral. There is no allegation that Microlink is unqualified to hold a license, nor is there any indication that the public interest would not be served by the assignment. At this stage, petitioners have not proven that Mr. O'Quinn is one of the individuals responsible for the alleged wrongdoing in the companies which are the subject of its complaint. More importantly, Metrolink itself is not implicated in the alleged wrongdoing.[2] Finally, petitioners do not argue that either Prestwood or Mr. Henry share in the alleged wrongdoing which is the subject of the complaint against Mr. O'Quinn's companies.

5. As noted *supra*, paragraph 3, a specific condition on a license may be imposed pending the outcome of any complaint or hearing proceeding. Here, however, Mr. O'Quinn has divested himself of all interest in Metrolink,[3] and since no allegations are made against Mr. Henry or Prestwood, no condition on grant of the captioned assignment need be considered.[4]

6. WHEREFORE, the foregoing premises considered, IT IS HEREBY ORDERED that the application of Prestwood Communications and Metrolink II, Inc., File No. 22588-CD-AL-01-89, IS GRANTED.

7. IT IS FURTHER ORDERED that the informal petition of PortaPhone, Inc., and Portable Telephone Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division

FOOTNOTES

[1] Petitioners' letter request to defer the captioned application is accepted under Section 1.41 of the Commission's Rules as an informal request for Commission action.

[2] *Compare, RKO General, Inc.*, 82 F.C.C.2d 291 (1980) (having conducted a hearing and made a finding of wrongdoing against RKO, the Commission found that a reorganization proposed by RKO to keep its licenses "would not necessarily isolate the wrongdoers and remove them from the management of the resulting Commission licensee.")

[3] Mr. O'Quinn's transfer of his shareholder interest to Mr. Henry is not a substantive change in ownership or control within the meaning of Section 309(c)(2)(B) of the Communications Act. *Barnes Enterprises, Inc.*, 55 F.C.C.2d 721, 725, note 4 (1974).

[4] An additional letter filed by counsel for Petitioners on August 18, 1989, raises for the first time the argument that Mr. Don Buzzelli, an officer of Metrolink, is also an employee of one or more of the Defendants in File Nos. E-89-71 through E-89-74, and therefore the removal of Mr. O'Quinn does not remove the connection between Metrolink and the Defendants. No evidence has been submitted to support this allegation. Moreover, by letter dated August 29, 1989, Metrolink states that the Petitioners' claim is untrue and wholly without foundation. Accordingly, Prestwood's comments do not justify a condition on the grant of the captioned application.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

Ameritech Operating Companies Revisions to Tariff F.C.C. No. 2	Transmittal Nos. 341, 342, 343, 344, 346, 348, and 350
Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 68	Transmittal Nos. 1825 and 1832

ORDER

Adopted: August 29, 1989; Released: August 31, 1989

By the Deputy Chief, Common Carrier Bureau:

1. By the above-referenced transmittals, the two listed local exchange carriers (LECs) have proposed revisions to their tariffs for access services to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings. The revisions are scheduled to become effective on dates ranging from September 4, 1989, to September 23, 1989. None of the revisions is opposed.

2. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of LECs' proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings and establishing a pleading cycle.[1] The above-referenced transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the instant transmittals will be subject to the outcome of that investigation. We also grant the LECs listed above special permission to advance the effective dates of these transmittals.

3. Accordingly, IT IS ORDERED that Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal Nos. 341, 342, 343, 344, 346, 348, and 350, and Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal Nos. 1825, and 1832, are subject to the investigation instituted in CC Docket No. 88-136.

4. IT IS FURTHER ORDERED that the local exchange carriers listed in paragraph 3, *supra*, may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 89-656.

5. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

6. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the local exchange carriers subject to this investigation shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services which are the subject of such investigation.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

FOOTNOTE

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (Com.Car.Bur. 1988) (*Designation Order*). *See also* Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (Com.Car.Bur. 1988); Public Notice, Network Communications, Inc., Files Comments on Individual Case Basis Rates for DS3 Services, CC Docket No. 88-136, DA 89-2, released Jan. 27, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-89

In the Matter of

Imposing Syndicated Exclusivity
Requirements on Satellite Delivery
of Television Broadcast Signals
to Home Satellite Earth Station
Receivers

ORDER PARTIALLY GRANTING MOTIONS FOR EXTENSION OF TIME TO FILE COMMENTS

Adopted: August 29, 1989; Released: August 31, 1989

By the Chief, Mass Media Bureau:

1. On April 12, 1989, the Commission adopted a *Notice of Inquiry and Notice of Proposed Rule Making*, 4 FCC Rcd 3889 (1989) (" *Notice* "), in the above-captioned proceeding in order to establish a record upon which to determine the feasibility of applying the Commission's syndicated exclusivity rules to satellite-delivered video programming received by home satellite dishes. In response to two motions for extension of time, the Commission issued an order, adopted June 29, 1989, extending the time for filing comments until August 7, 1989, and the time for filing reply comments until September 5, 1989. *See Order Granting Motions for Extension of Time to File Comments* in Gen. Docket No. 89-89, DA 89-753 (released July 3, 1989).

2. Before the Commission are three motions requesting that the Commission further extend the deadline for filing reply comments. General Instrument Corporation ("GIC"), in a motion filed on August 21, 1989, has requested a four-week extension of time. The Satellite Broadcasting and Communications Association of America ("SBCA"), in a motion filed on August 22, 1989, and Netlink USA ("Netlink"), in a motion filed on August 23, 1989, have requested a 30-day extension. All three motions are unopposed.

3. GIC states that a consultants' report submitted with comments filed by the National Association of Broadcasters ("NAB"), *et al.*, contains a number of detailed allegations regarding GIC products, and that for the most part these allegations are assertedly without factual support. GIC requests an extension of time to respond to these allegations and to prepare affidavits from company officials. In addition, GIC notes that the reply comment period covers a "popular vacation time" (late August), as well as the Labor Day holiday weekend, and that key GIC employees will be unavailable during this time.

4. Similarly, the SBCA contends that the report submitted by NAB, *et al.*, contains factual errors, and that additional time is necessary to evaluate and rebut the assertions contained in that report. The SBCA also states that it is attempting to gather data from GIC and others in the industry on the points raised by the report, but that many of the key individuals are unavailable until after the Labor Day weekend. In addition, the SBCA states that parties involved in a proposed Ku-band satellite service using GE Americom's K-1 satellite for the delivery of superstations will brief the SBCA on the planned operations of that service following Labor Day, and that the information thus obtained may be relevant to this proceeding.

5. Netlink also questions the validity of the report submitted by NAB, *et al.*, and asserts that analyzing and responding to this report may take extensive time and study, and that Netlink may need to employ an independent consultant to respond to the report. Netlink states that the allotted time for filing reply comments is insufficient, particularly in light of the intervening Labor Day weekend and vacation plans.

6. It is the Commission's policy that requests for extensions of time not be granted routinely. *See* 47 C.F.R. § 1.46. We have already granted a one-month extension of time to file initial and reply comments, and, at the outset, we established a one-month interval between the initial comment and reply comment deadlines in anticipation of the time that would be necessary to analyze the broad range of complex technical and economic issues presented in the *Notice*. While we have stressed the need for detailed and specific information and data on these issues, we do not believe that a four-week or one-month further extension of time to file reply comments will appreciably improve the quality of the information sought in this proceeding. Nevertheless, some additional time for reply appears warranted, in view of the complexity of the information submitted by the commenting parties. Accordingly, we will grant the motions in part and extend the deadline for filing reply comments by two weeks, to September 19, 1989.

7. Accordingly, IT IS ORDERED that the motions for extension of time filed by GIC, SBCA and Netlink ARE GRANTED IN PART consistent with this *Order*, and are otherwise DENIED.

8. IT IS THEREFORE ORDERED that the time for filing reply comments in this proceeding ARE EXTENDED to September 19, 1989.

9. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, and 1.46 of the Commission's Rules.

10. For further information concerning this proceeding, contact David E. Horowitz, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Application of

Coastal Radio, Inc. File No. 615568
For a five channel SMR station
in Augusta, Maine

ORDER

Adopted: September 1, 1989; Released: September 11, 1989

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. The Private Radio Bureau has before it for consideration a petition, filed by Coastal Radio, Inc. (Coastal), requesting reinstatement and grant of its application for a Specialized Mobile Radio (SMR) station in Augusta, Maine. The Licensing Division dismissed the application as defective because of its apparent conflict with the provisions of Section 90.627(b) of the Rules, 47 C.F.R. § 90.627(b), which limits a licensee to one unloaded SMR station within 40 miles of any other trunked system licensed to the same applicants.[1] For the reasons discussed below, we affirm the dismissal of the subject application.

II. BACKGROUND

2. On January 6, 1986, Summit Mobile Radio Company (Summit) filed a license application (File No. 504273) for a five channel SMR station with a proposed transmitter location on Streaked Mountain in Hebron, Maine. The application was executed by Bruce S. Hamlin, President of Summit. The application was granted and a license for five channel SMR station WNAU 450 was issued to Summit on March 26, 1986. Then, on May 20, 1988, Mr. Hamlin, on behalf of Coastal, filed the subject application (File No. 615568) for a five channel SMR station with a proposed transmitter site in Augusta, Maine, located approximately 32 miles from Summit's station WNAU 450. This application included a statement that Hamlin is the controlling shareholder of Coastal and the President of Summit, but that Hamlin does not own a controlling interest in Summit and that Summit holds no interest in Coastal.

3. Nevertheless, the Licensing Division dismissed Coastal's application as defective[2] because of its apparent conflict with the one-to-a-market provisions of Section 90.627(b) of the Commission's Rules. Section 90.627(b), as previously indicated, provides that "no licensee will be authorized an additional trunked system within 40 miles of an existing system [unless] the licensee's existing system is loaded to at least 70 mobile and control stations per channel." The Bureau's records, in this regard, disclosed that only 205 mobile and control stations were licensed on Summit's station WNAU 450, far fewer than the 70 units per channel required by Section 90.627(b) for authorization of an additional trunked SMR station within 40 miles. Because Hamlin was the President of Summit and the controlling stockholder of Coastal, the Coastal application was dismissed. The instant petition for reconsideration followed.

III. THE COASTAL PETITION

4. Coastal's petition is based on its assertion that Coastal and Summit are not the same real party in interest and are not controlled by the same real party in interest. Thus, Coastal argues that the Commission's Rules impose no bar to the grant of Coastal's application.

5. In support of its petition, Coastal references the language of Section 90.627(b) of the Rules that refers only to "licensees" having a prohibitive interest in more than one unloaded SMR station within 40 miles. Coastal maintains that this rule section does not prohibit a real party in interest from having *any* interest in more than one unloaded facility in a given 40 mile area. Consequently, Coastal submits that the only reasonable interpretation of Section 90.627(b) is that the same real party in interest may not *control* more than one unloaded system in a geographic area. Any other interpretation, Coastal alleges, would disqualify a publicly held corporation from being an SMR licensee if any shareholder were also a licensee of an unloaded SMR station in the same area.

IV. DISCUSSION

6. SMR licensees are commercial entities or entrepreneurs authorized to make their radio facilities available for use by eligible end-users. Such licensees assume the financial risks and obligations associated with the construction and operation of 800 MHz trunked systems so that they can provide a communications service on a for profit basis. [3]

7. To maximize competition and its benefits to the consumer, the Commission imposed on SMR system licensees an obligation to load their systems with mobile units as a means of utilizing "the competitive forces of the market place as a regulatory tool to insure efficient and effective frequency use."[4] Thus, SMR licensees must satisfy express loading criteria to warrant retention of their full complement of SMR channels.[5] Similarly, to avoid the warehousing of scarce 800 MHz frequencies, licensees must demonstrate a need for additional frequencies by satisfying minimum loading standards before additional frequencies can be assigned in the same market.[6] To this end, Section 90.627(b) serves to preclude situations where the same individual has a relationship, such as a stockholder, officer, or director, in more than one system in the same market area.[7]

8. Hamlin is the controlling shareholder of an SMR applicant, Coastal, and also serves as the president of the licensee of an unloaded SMR station in the same market, namely, Summit's station WNAU 450. Therefore, Coastal's application violates Section 90.627(b) of the Rules and was properly dismissed.[8] To accept applications in which the controlling shareholder of an applicant is also an officer of an unloaded licensee in the same market area would quickly deplete the limited available 800 MHz spectrum and deny access to applicants that wish to provide *bona fide* competitive SMR service. Coastal's attempt to equate the real party in interest issues involving small closely held corporations with publicly held companies is,

moreover, unpersuasive. Section 90.627(b) is not intended to prohibit shareholders of such public companies that own a *de minimus* interest in the corporation from becoming licensed for SMR facilities in the same market. The provision of SMR service by such individuals would not be anticompetitive, inconsistent with the individual's status as shareholder of a publicly held corporation, or in conflict with the Commission's standards for expansion of existing systems. We conclude, therefore, that Hamlin's status as a corporate officer of Summit, an unloaded SMR licensee, precludes him from prosecuting the instant application, as a controlling shareholder of Coastal, for an SMR station in the same market.

V. CONCLUSION

9. Accordingly, IT IS ORDERED that Coastal's petition for reconsideration of the dismissal of its application (File No. 615568) is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] Letter from Terry Fishel, Chief, Land Mobile Branch to Brown and Schwaninger, counsel for Coastal, September 27, 1988.

[2] *See* 47 C.F.R. § 1.958, which provides that an application will be considered to be defective if the application is not in accordance with the Commission's Rules.

[3] *See* Land Mobile Radio Service, Docket 18262, Second Report and Order, 46 FCC 2d 752 (1974), *recon. in part*, 51 FCC 2d 945, *clarified*, 55 FCC 2d 771 (1975), *aff'd sub nom.* National Association of Regulatory Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.) (" *NARUC* "), *cert. denied*, 425 U.S. 992 (1976).

[4] *See, e.g.*, 51 FCC 2d at 957-60, 972-74; and 525 F.2d at 635-47.

[5] 51 FCC 2d at 983.

[6] *See* 47 C.F.R. § 90.627(b).

[7] The Commission has stated its objection to situations where corporate applicants and officers or other employees of such applicants file SMR applications for systems in the same market. Specifically, the Commission considers applications filed by employers and their employees for SMR stations in the same area as *prima facie* evidence of an attempt to circumvent the provisions of Section 90.627(b) of the Rules. The Commission also considers any direct or indirect financial interests in more than one application in a market, including stock ownership, to be prohibited interests. *See* Public Notice No. 0539, released November 4, 1986, 4-5, Appendix II, concerning the Commission's Private Land Mobile Application Procedures for 900 MHz band frequencies.

[8] Dismissal of Coastal's application is consistent with longstanding Commission policy that "[n]o person may be a principal in applications whose 40 dBu contours overlap." *See Public Notice* No. 166, released October 12, 1982, at 5, concerning procedures for 800 MHz private land mobile applications. The 40 dBu contour defines a market area and for the purpose of this Public Notice is the equivalent of the Commission's "40 mile rule" specified in Section 90.627(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

MCI INTERNATIONAL,
INC, and RCA GLOBAL
COMMUNICATIONS, INC.,
Complainants,

v. File No. E-89-135

CONTEL ASC,
Defendant.

ORDER

Adopted: September 1, 1989; Released: September 11, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. MCI International, Inc. and RCA Global Communications, Inc. (collectively "MCII"), filed a Motion to Extend Time to Answer Interrogatories in the above-captioned matter. CICI, Inc., d/b/a/ Contel ASC International Division ("CICI") opposes the motion.

2. MCII states that it needs a two-week extension, until September 8, 1989, to file answers to CICI's First Set of Interrogatories to MCII. It explains that the parties have been attempting to negotiate a compromise of the dispute and that it has attempted to avoid a diversion of resources from this effort. Moreover, because of the unavailability of key personnel, it cannot respond by August 25, 1989.

3. CICI argues that although the parties have been attempting to negotiate a settlement, MCII has not responded to a settlement agreement proposed by CICI approximately three weeks ago. Therefore, settlement negotiations terminated on August 25, 1989, because of lack of response by MCII. CICI states that the interrogatories were filed on May 30, 1989, and two motions for extensions of time were granted for a total of 57 days. CICI maintains that this amount of time is sufficient to assemble the necessary information. It contends that if MCII is not going to discuss settlement seriously, it should be ordered to answer the interrogatories without further delay.

4. While we agree with CICI that MCII appears to have had ample time to assemble its answers to the interrogatories, we will grant MCII's motion. Settlement negotiations broke down on the date the answers were due, and MCII may have relied on Commission staff representations that it would be favorably disposed toward motions for extentions of time while the parties were negotiating. However, we do not envision granting MCII any further extensions of time.

5. Notwithstanding CICI's statement that negotiations terminated on August 25, 1989, we expect the parties to continue to negotiate in an attempt to resolve the dispute and to keep us informed of their progress. Therefore, we direct the parties to submit a progress report, either jointly or separately, within two weeks of the release of this order.

6. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that the Motion to Extend Time To Answer Interrogatories, filed by MCII IS GRANTED.

7. IT IS FURTHER ORDERED that MCII and CICI file a progress report on the status of negotiations within two weeks of the release of this order.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-79

In the Matter of

Amendments of Part 69 of the
Commission's Rules Relating to
the Creation of Access Charge
Subelements for Open Network
Architecture

ORDER

Adopted: August 31, 1989; Released: September 1, 1989

By the Deputy Chief, Common Carrier Bureau:

1. On August 23, 1989, the National Association of Regulatory Utility Commissioners (NARUC) filed a motion requesting that the time for filing reply comments in the above-captioned proceeding be extended 90 days from the current deadline of September 11.[1] By motion dated August 29, 1989, CompuServe Inc. (CompuServe) requests a 45-day extension of the current reply comment date.[2] One extension of time previously has been granted in this proceeding. [3]

2. Both NARUC and Compuserve (collectively movants) state that additional time is required to analyze and respond to the over 50 initial comments filed in this proceeding.[4] Both parties also emphasize that the comments are quite voluminous -- Compuserve states that the record thus far is some 1600 pages -- and raise complex issues.[5] Compuserve states that the issues raised in this proceeding, concerning the costing and pricing of Basic Service Elements and Basic Serving Arrangements, and the access charge treatment applicable to enhanced service providers, "raise fundamentally important and difficult questions."[6] It also cites a number of pleadings containing complex technical proposals and studies that it contends require additional time to digest, study, and answer.[7]

3. Athough it is Commission policy that extensions of time shall not be routinely granted,[8] we are persuaded by the circumstances presented to grant movants' request in part. Therefore, in recognition of the importance and complexity of the issues raised in the voluminous initial comments in this proceeding,[9] and in accordance with the traditional Commission policy of promoting comity with NARUC and its members, we will extend the deadline for the filing of reply comments thirty days, to October 11, 1989.

4. IT IS THEREFORE ORDERED that the NARUC Motion for Extension of Time in Which To File Comments and the CompuServe Motion for Extension of Time ARE GRANTED IN PART AND DENIED IN PART, and that the time for filing reply comments in the instant proceeding IS hereby EXTENDED to October 11, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] NARUC Motion for Extension of Time in Which To File Comments, dated Aug. 23, 1989 (NARUC Motion).

[2] CompuServe Motion for Extension of Time, dated Aug. 29, 1989 (CompuServe Motion).

[3] That extension enlarged the time period for filing initial comments from June 26 to August 10, 1989, and established September 11 as the date for filing reply comments. Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, 4 FCC Rcd 5097 (1989).

[4] NARUC Motion at 2-3; CompuServe Motion at 2-4.

[5] Compuserve Motion at 2-4; NARUC Motion at 2-3.

[6] CompuServe Motion at 3.

[7] CompuServe Motion at 2-3 & nn 4-6.

[8] 47 C.F.R. § 1.46 (a).

[9] *See* generally Public Notice, Motions for Extension of Time Before the Common Carrier Bureau, 44 Rad. Reg. 2d (P&F) 96 (Com. Car. Bur. 1978)("extensions may be entertained where it is shown that . . . [t]he matter is unusually complex ").

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 11, 1989

Commissioner Patricia Diaz Dennis releases separate statement in Memorandum Opinion Order and Authorization in FCC 89-127, released July 17, 1989, 4 FCC Rcd 5693.

SEPARATE STATETMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Application of General Telephone Company of California, FCC 89-127, 37665, File Nos. W-P-C 5927 and 6250.

I concur in the decision to grant General Telephone Company of California ("General") a waiver, limited in time and scope, to build and operate an experimental cable system in Cerritos, California, on condition that it report on the results for the benefit of the Commission and the public. this separate statement, born out of an abiding interest in the potential merger of the cable and telecommunications industries, is to emphasize certain concerns and clarify my vote in light of positions I have taken.

Particularly in the optical fiber portion of General's project, this experiment holds the promise of bringing closer to reality the fabled intergrated communications system that will offer video services, as well as interconnected voice and data communcations. Now, we can only guess at the practical feasibility of such a system. General's experiment could provide valuable information to the Commission and the public. This could aid in deciding whether we can or should pursue a policy of encouraging competition between cable operators and telephone companies, i.e., the "two-wire" scenario, or whether a single, integrated system is in the public interest, i.e., a "one wire" scenario.

In other contexts, I have generally favored open access as the best method to insure the competition which will benefit the public interest. [1] In General's limited 5-year experiment, however, the imposition of tariffed open access requirements would be of little utility and could well prove counterproductive. The cost of fashioning and administering such conditions could also exceed any significant useful benefit to the public by the time they could be implemented.

In case it passed unnoticed, the Commission's statement at footnote 45 bears special attention. It constitutes a recognition of limitation on the "let the Market Decide" credo. The Commission correctly notes the fallacy in arguing that, because near video on demand failed commercially in Rochester, New York, a good cause waiver allowing General to participate in a market test in Cerritos is unwarranted. One problem with the argument is that it is not always clear what the market decided (even if it is possible to discern the metaphorical "market").

The discussion at paragraphs 49-50 also warrants comment. It displays the Commission's unfortunate perchant for finding all fact situations "unique". Rather than seeking broadly applicable principles for decisionmaking, we tend to decide matters *ad hoc*. This Erich Segal approach--it means never having to say, "We're sorry"-- may give the Commission maximum running room in similar cases, but it leaves the public at a loss to predict and plan their future.

Finally, I find the ordering clause of paragraph 61 (b) (3) too general in describing the reports expected from General and too liberal in allowing General to designate information as "proprietary." If the FCC and the public are to receive the information from this experiment to make public policy, such as the "one wire" vs. "two wire" decision referenced above, then General should be instructed to supply it. I trust that, over the next five years, the Common Carrier Bureau staff will elaborate on the letter of this order by enforcing its spirit and purpose.

FOOTNOTE FOR STATEMENT

[1] See Remarks by Commissioner Patricia Diaz Dennis before the FCBA/PLI Annual Meeting (December 1, 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 11, 1989

Commissioner Patricia Diaz Dennis releases separate statement in Report and Order and Second Further Notice of Proposed Rule Making in FCC 89-91, released April 17, 1989, 4 FCC Rcd 2873.

SEPARATE STATEMENT
OF
COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313.

Primarily because it affords AT&T a degree of pricing flexibility and provides incentives for AT&T to become more efficient, I concur in undertaking this grand experiment of price caps for AT&T. The Order is curious, however, because it professes to be a better method of regulating dominant carriers. Yet it imposes significant additional regulatory burdens on AT&T at the same time that it affords AT&T additional pricing flexibility. It also defers implementing price caps for the Local Exchange Carriers (LECs). As such, the Order is at odds with itself.

Rather than eliminating rate of return regulation of AT&T, we are keeping much of it as a check on the reasonableness of the price cap method. We are also adding reporting requirements on service quality and creating an elaborate regulatory structure that will have to be defined, refined, and monitored: baskets; bands that will be subject to weighting and indexing; price floors; "new" services; and service "restructurings". These and other regulatory measures, including cost support requirements in some instances, make price caps far from the ideal "better form of regulation" that it was supposed to have been. *Cf.* Comments of the U.K. Office of Telecommunications, 2 November 1987.

I would have preferred to approach the issue differently. To the extent that price caps is a transition to deregulating AT&T, I would have first asked whether and to what extent AT&T is still dominant in the interexchange market or markets. The anecdotal evidence is that AT&T faces growing competition. *(See, e.g.,* Separate Statement of Commissioner Patricia Diaz Dennis in the AT&T ONA proceeding, FCC 88-382, released December 22, 1988). If, after a thorough investigation, we determined that AT&T were nondominant in a defined market or submarket, we should be able to eliminate the additional regulatory burden that this Order imposes on AT&T. "Safeguards" such as service quality monitoring or price floors, for example, might be unnecessary. Indeed, our current regulatory scheme might be extensively realigned to comport with marketplace realities. [1] As matters now stand, however, price caps for AT&T results in many ways in more, not less, regulation when the opposite result would seem more appropriate. [2]

Accepting the Order's characterization of AT&T as a dominant carrier, however, there are aspects of the Order that I find troublesome. First, I disagree with the Order's assertion at paras. 424-430 that AT&T's existing rates are an appropriate starting point for price caps. The Order's primary reason for adopting these rates is that AT&T has not earned its allowed rate of return for some time now. However, this says nothing about the reasonableness of any individual rate. *See* Separate Statement of Commissioner Patricia Diaz Dennis in the Further NPRM in CC Docket 87-313, 3 FCC Rcd 3195 (1988).

Moreover, not all of AT&T's effective tariffs are equal. Some have been subject to public comment and a preliminary ruling on their reasonableness. [3] Such tariffs are potential candidates for a presumption of reasonableness. Other tariffs simply took effect without objection and without Commission action of any kind. A tariff filing "is not a submission for approval and acceptance of a tariff does not imply that any of the charges are lawful." *General Communications, Inc. v. Alascom, Inc.*, FCC 88-110, released March 14, 1988 at para. 14. With respect to some AT&T tariffs, competition may be vigorous enough to force AT&T's rates close to the zone of reasonableness. [4] The Order, however, draws no such distinctions.

If competition is insufficient to force AT&T's rates close to the zone of reasonableness, then the regulatory process is the only alternative mechanism for doing so. Many of AT&T's existing rates are still under a regulatory cloud, either because they are under investigation, *see, e.g.,* Order at n. 944, or for other reasons. If particular rates are under investigation, why should the Commission presume that within-band, under cap changes to such rates are reasonable? It is at least as likely that such rate changes will make an unreasonable rate more unreasonable.

Other proceedings indirectly question the validity of AT&T's existing rates. For example, AT&T's Tariff 15, which provides a discount off of AT&T's Hospitality Network Service offering for the benefit of a single customer, Holiday Inn, remains under investigation. One of the fundamental issues is whether AT&T's offer to Holiday Inn is an undue, and hence unreasonable, preference under Section 202(a) of the Communications Act. *See AT&T Communications*, Transmittal No. 1215, CC Docket No. 88-471, FCC 88-299, released September 20, 1988 at para. 44. AT&T might well be required to make the Holiday Rate Plan generally available. *Compare AT&T, Revisions to Tariff FCC No. 12*, FCC 89-116, released April 18, 1989. As long as there is a real possibility that the lower rates of the Holiday Rate Plan (which are now excluded from price caps) will be made generally available, then the higher existing rates for Hospitality Network Service should not be presumed reasonable.

Another example: recently, the Common Carrier Bureau published a report to the Commission entitled "International Accounting Rates and the Balance of Payments Deficit in Telecommunications Services" dated December 12, 1988. There, the Bureau stated at p. 13 that "it is clear that the prices charged for international calls...far exceed their cost". If rates for international services are too high, they may not be a reasonable starting point for price caps.

My second concern is with the level of profits possible under price caps. Under traditional utility law, the return to shareholders of a regulated enterprise should be commensurate with returns on investments in other enterprises having corresponding risks, *FPC v. Hope Natural*

Gas Co., 320 U.S. 591 (1944). The Order acknowledges the necessity of ensuring that carriers do not earn excessive profits in light of their costs. *See* Order at para. 882.

The Order predicts that the price cap formula "is unlikely to produce rates outside the zone of reasonableness within the first four years." But if the Commission's predictions of AT&T's efficiency and how much AT&T might earn are inaccurate, AT&T's rates and earnings might rise to unreasonable levels. In calculating a productivity factor for AT&T, the Order relies heavily on historical data predating the AT&T divestiture. These data are of questionable relevance to the postdivestiture AT&T, which has stepped up its efforts to become more productive. *See, e.g.*, AT&T Press Release, December 1, 1988, announcing a $6.7 billion writedown of network analog equipment and related charges and acceleration of network digitization. AT&T's productivity between 1984 and 1988 is also of questionable value given the Order's recognition, at para. 235, that "productivity measures over short time periods are of less value than longer term averages."

I am, therefore, pleased by the order's unambiguous commitment, at para. 562, to intervene if price caps, in fact, result in unjust and unreasonable rates. The Commission should continue to monitor AT&T's earnings so long as AT&T is classified as dominant and not found subject to effective competition. As an additional safeguard against unreasonable earnings, however, I would have been inclined to implement a sharing mechanism, *e.g.*, a 50-50 sharing of earnings over a particular rate of return or return on equity between ratepayers and shareholders. (Commenters should address whether this mechanism is appropriate for the LECs in response to the further notice of proposed rulemaking.)

My third concern is with rate *structure* changes that might result from the rate *level* changes that the Order proposes to resume reasonable. Possible structural changes include narrowing or eliminating geographic averaging of MTS rates and of the evening/night/weekend dicounts. Changes to these discounts may or may not be in the public interest. As the Order recognizes at para. 376, however, these discount rate periods tend to be used most by residential consumers whose interests the Order seeks to protect, *see* para. 363. I would subject them to normal tariff filing procedures.

Changes to the nationwide averaged rate structure for MTS raise significant public interest concerns that pit social equity against economic efficiency. In a recent proceeding raising similar issues, the Commission allowed LECs to withdraw from the carrier common line pool. Although we put into effect mechanisms to ensure that CCL rates did not skyrocket, the long-term implications of our actions are not yet clear. It may become attractive, for example, for new interexchange carries to serve only cities with low access charges with rates that undercut the nationwide geographically averaged rate structure that is commonly used for MTS. Customers would have an incentive to use the deaveraged, low price carrier to call to cities having low access charges and to use the nationwide ageraged rate structure to call all other cities. In the long term, this practice would undermine the nationwide geopraphically averaged MTS rate structure. *See, e.g.*, Comments of the Public Service Commission of Wisconsin, July 25, 1988 at 2-3.

The rate averaging issue is not unique to the communications industry; it continues to be an issue in the airline industry even today, more than ten years after the passage of airline deregulation legislation. Coming from rural New Mexico, I am acutely aware of concerns of rural Americans, who would feel like second class citizens if it cost them more to call or be called by the rest of America. The Commission has not yet confronted head-on the issue of rate deaveraging for MTS. I am, therfore, gratified that the Order would not presume reasonable any geographic deaverging of MTS. Reasonably priced telephone service for rural America is and should remain an overarching public policy goal.

FOOTNOTES FOR STATMENT

[1] Once a factual predicate is established for analyzing competition in the interexchange market, regulation in defined markets could run the gamut from minimal, consistent with the Communications Act, to more extensive, depending on all the various indicia of market dominance.

[2] While the Order adopts price cap regulation for a carrier which may face effective competion, it defers implementing this new form of regulation for the local exhange carriers (LECs) which do not. There is evidence in the record that price caps work best where little or not competition exists. *(See, e.g.*, Reply Comments of BellSouth Corporation, December 4, 1987, and Appendix A, (Testimony of Alfred Kahn and William Shew) As BellSouth put it, "If the view of some commenters that the LECs face less competition than AT&T is correct, It mades a stronger public policy case for adoption of price capt regulation for the LEC's, rather than a weaker case." *Id.* at 14. Dr. Leland Johnson agrees: "More important targets [than AT&T] for price caps are the LECs for services subject to state regulation as well as to FCC oversight." *See* Johnson, Price Caps in Telecommunications Regulatory Reform, the RAND Corporation, Santa Monica, California, January 1989 at 35. Price caps could admittedly be more complex to adopt for the LECs. However, if it really is a better way to regulate dominant carriers, the Commission would have been better advised to concentrate its resources on price caps for LECs.

[3] Some of these rulings are summary in nature and give no reasons for their result, however.

[4] The Order argues at para. 429 that competition exercises some discipline on AT&T's pricing, but there is no finding that the competition that AT&T faces is generally sufficient to force its rates into the zone of reasonableness. In *Statements of General Policy: International Air Cargo Rate Flexibility Policy*, 48 F.R. 4271, January 31, 1983, *aff'd in relevant part sub nom. Advanced Micro Devices v. C.A.B.*, 742 F.2d 1520 (D.C. Cir. 1984), the C.A.B. established a no-suspension zone for air cargo rates similar to that which the Commission here establishes for AT&T. It decided that the zone should be measured with respect to rates in effect on April 1, 1982. The C.A.B. picked this date "primarily because relatively competitive conditions prevailed in most major cargo markets during the preceding year," 48 F.R. at 4276. The instant Order, however, makes no similar finding.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 13, 1989

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AT&T'S PETITION FOR WAIVER OF COMPARABLY EFFICIENT INTERCONNECTION REQUIREMENTS OF THIRD COMPUTER INQUIRY

On August 18, 1989, the American Telephone and Telegraph Company (AT&T) filed a petition for waiver of the Commission's *Computer III* comparably efficient interconnection (CEI) requirements as applied to its offering of DIAL IT 900 Service Call Count Arrangements. To avoid any disruption of this service, AT&T seeks prompt action on the Petition or temporary authorization to continue offering the service until the Commission rules.

The Call Count offering is a service arrangement that allows DIAL IT 900 customers to conduct surveys on matters of public interest for a cost of $25 per arrangement each program day. AT&T has been offering Call Count Arrangements for nine years. Recently, the Commission found that the Call Count Arrangement is an enhanced service because it involves the provision of "additional, different, or restructured information . . . ." *AT&T 900 Dial - It Services and Third Party Billing and Collection Services*, 4 FCC Rcd 3429 (1989). Thus, AT&T is required to provide Call Count Arrangements in accordance with the CEI requirements and nonstructural safeguards of *Computer III*.

AT&T states that it cannot reasonably provide enhanced service providers (ESPs) with comparably efficient interconnection to the basic services underlying the existing Call Count Arrangement because the hardware and software for the service are integrated into its 4ESS switch. As a result, AT&T states that there is no interface between the basic and enhanced functions permitting AT&T to separate them and offer the basic service capability for use by an ESP wishing to perform its own enhanced call count service.

AT&T states that it could conceivably offer such a basic service to the ESPs patterned after 800 INFO-1. However, AT&T states that the costs of providing service in this manner would be exceptionally high, and it believes that ESPs would not be willing to incur the costs associated with disaggregated provision of the basic services underlying DIAL-IT 900 service. Thus, AT&T states that if it were required to offer the underlying basic services on a disaggregated basis, it would probably discontinue the DIAL-IT 900 offering.

AT&T believes that these unique circumstances warrant a waiver of the CEI requirements and argues that a waiver would be in the public interest and further the Commission's *Computer III* goals by offering enhanced services to the public in the most efficient manner possible.

Interested parties should file comments on this petition by **October 2, 1989,** and reply comments by **October 11, 1989,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of AT&T's petition can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-510

In re Applications of

RAMON RODRIGUEZ, *et al.*, d/b/a RAMON RODRIGUEZ & ASSOCIATES
Lajas, Puerto Rico — File No. BPH-821208AA

DAVID ORTIZ RADIO CORPORATION
Lajas, Puerto Rico — File No. BPH-830722AL

For Construction Permit
for a New FM Station at
Lajas, Puerto Rico

Appearances

Christopher D. Imlay on behalf of Ramon Rodriguez, *et al.*, d/b/a Ramon Rodriguez and Associates, Inc.; *Vincent J. Curtis, Jr.*, and *Robert A. DePont* on behalf of David Ortiz Radio Corporation.

DECISION

Adopted: September 5, 1989; Released: September 13, 1989

By the Review Board: MARINO [1] (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. In this proceeding, involving the applications of Ramon Rodriguez & Associates (Rodriguez) and David Ortiz Radio Corporation (Ortiz) for authority to construct a new FM broadcast station in Lajas, Puerto Rico, Administrative Law Judge John M. Frysiak (ALJ) awarded the construction permit to Rodriguez based solely on comparative considerations. *Initial Decision* (I.D.), 4 FCC Rcd 370 (1989). Exceptions were filed by Ortiz and limited exceptions by Rodriguez; oral argument was heard July 28, 1989. Based on our review of the record herein, we affirm the grant to Rodriguez.

Pre - Hearing Rulings

2. In its exceptions, Ortiz focuses largely on a number of rulings made by the ALJ prior to hearing with which it disagrees. Specifically, Ortiz contends that the ALJ erred in refusing to permit Ortiz to adduce evidence regarding its past broadcast record, improperly awarded summary decision to Rodriguez under a specified site misrepresentation issue, and incorrectly failed to add Rule 1.65/lack of candor and abuse of process issues against Rodriguez. Because only some of Ortiz's many allegations have substance, we have limited our treatment herein to those which have some relevance or which may be decisionally significant. *See* 47 C.F.R. §1.282(b).

3. First, Ortiz excepts to the ALJ's *Order*, FCC 88M-2218, released July 13, 1988, which granted Rodriguez's motion for partial summary decision of a site misrepresentation issue. That issue was added to determine whether Rodriguez misrepresented facts to the Commission by proposing a transmitter site without having made inquiry as to its availability. *Memorandum Opinion and Order*, FCC 88M-436, released February 18, 1988. The issue was premised on the allegation that Rodriguez had simply specified the site of its opponent, Ortiz, and on Commission precedent holding that an applicant may not automatically assume the availability of another applicant's site. *South Florida Broadcasting, Co., Inc.*, 99 FCC 2d 840, 846 (Rev. Bd. 1984). In moving for summary decision, Rodriguez submitted excerpts from deposition testimony of its president, Ramon Rodriguez Guzman, a written statement by Mr. Rodriguez, and an affidavit previously filed by Mr. Rodriguez in this proceeding. In these submissions, Rodriguez explained that he specified the same site previously chosen by Ortiz; that upon learning the land in question belonged to the Puerto Rican government, he verified from a local land use attorney that if government land was available for Ortiz's use, it would also be available to him; that he spoke with an employee of the Natural Resources Agency at Boqueron who told him the land would be available for use as a transmitter site; that he then visited the Agency's offices in San Juan where he was told to pay a $240 land users permit filing fee (which he did); and that it was only after further inquiries and investigation by him following the filing of his application that he learned the land in question actually belonged to another department of the government (the Conservation Trust), and was not available for his intended use as a transmitter site.

4. The ALJ granted Rodriguez's motion for partial summary decision, holding that no question of material fact any longer existed with respect to the misrepresentation issue specified against Rodriguez. We agree. Summary decision may be granted "where there is no genuine issue as to any material fact" for determination at the hearing. 47 C.F.R. §1.251(d). The filing party must support its motion by affidavit or other appropriate materials, and the opponent must support its position in like manner; neither side may rely on mere allegations or general denials. 47 C.F.R. §1.251(a)(1), (b), (c). Here, it appears from Rodriguez's uncontradicted affidavit and sworn deposition testimony that he proceeded in good faith in specifying a site on the basis of his knowledge that Ortiz had selected the same site, on his conversations with government personnel, on advice from legal counsel, and on his payment of a filing fee. Only after these steps were taken and the application was filed did he learn of the site's unavailability. Ortiz's general objections and denials, unsupported by affidavit(s), contained in its opposition to Rodriguez's motion, did not undermine or raise serious questions as to Rodriguez's *bona fides*, and were on their face insufficient to defeat the summary decision request. *Cf. Webster - Fuller Communications Associates*, 3 FCC Rcd 6967, 6968 (Rev. Bd. 1988). Therefore, the ALJ correctly concluded that Rodriguez did not attempt to deceive the Commission by proposing a transmitter site

without first inquiring as to its availability. Absent such illicit intent, no genuine issue of misrepresentation --the only issue requested or added pertaining to Rodriguez's site -- remained to be tried. *See Armando Garcia*, 3 FCC Rcd 1065, 1067 (Rev. Bd. 1988), *rev. denied*, 3 FCC Rcd 4767 (1988) (substantial evidence of deceptive intent is the *sine qua non* of a misrepresentation issue); *accord Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983); *Kaye - Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979). Accordingly, summary decision in Rodriguez's favor was appropriate. [2]

5. Ortiz also excepts to the ALJ's refusal to grant a so-called "motion for clarification" of his order specifying the misrepresentation issue against Rodriguez so as to include a Rule 1.65/lack of candor issue. The request, premised on a contention that Rodriguez concealed from the Commission the unavailability of its proposed site, was rejected by the ALJ on the ground that the pleadings before him indicated that there was no undue delay by Rodriguez in finding and amending to a new site, once he discovered that the government site was unavailable. *Memorandum Opinion and Order*, FCC 88M-1079, released April 13, 1988. We agree with the ALJ that no substantial basis for a non-reporting issue was established. While Rodriguez did not report the loss of his site within thirty days (required by 47 C.F.R. §1.65), as indicated earlier, no evidence was submitted to show that he acted deceptively or proceeded in bad faith either before or after he learned that his site was unavailable. In these circumstances, the failure to timely report would have at one time resulted, perhaps, in a comparative demerit, but this option is no longer available to us. *See Character Qualifications*, 102 FCC 2d 1179, 1230-1232 (1986). Absent anything other than speculation and surmise to support Ortiz's claim that the omission was intended to deceive, we conclude that the ALJ's ruling was correct. *Cf. Merrimack Valley Broadcasting, Inc.*, 55 RR 2d 23, 25 (1983).

6. Next, Ortiz challenges two rulings by the ALJ refusing to add abuse of process issues against Rodriguez. In the first (*Memorandum Opinion and Order*, FCC 88M-1902, released June 20, 1988), the ALJ declined to order a hearing into allegations that a very minor Rodriguez principal (Juan Carlos Rodriguez Maldonado, merely a 1% equity owner of the applicant) falsely represented himself as an FCC employee in the course of investigating the Ortiz application. We agree with the ALJ's disposition of this matter. The allegation in question was flatly denied by the Rodriguez principal, and his statement was supported by a third person. More important, however, insofar as Ortiz contends that the alleged impersonation would constitute a criminal violation of 18 U.S.C. 912, we observe that Ortiz has not even asserted that this matter was the subject of a criminal complaint, investigation, indictment, trial, or judgment of any sort, let alone a conviction. In pertinent part, it is the Commission's general policy not to take cognizance of misconduct involving alleged criminal activity unless it is finally adjudicated by a court. *Character Qualifications*, *supra*, at 1205. Accordingly, no issue was warranted. [3] In the second ruling objected to by Ortiz, *Memorandum Opinion and Order*, FCC 88M-1903, released June 20, 1988, the ALJ rejected a claim that Rodriguez made "reckless and scandalous" allegations that Ortiz and his daughter "suborned perjury" by making their employees sign false statements under the threat of being fired. As the ALJ ruled, while Rodriguez may have intimated a motive for Ortiz's employees to make their statements, no direct accusation of coercion or suborned perjury was made. As such, Ortiz's claim is both overstated and unsupported, and thus does not provide a substantial basis for an abuse of process issue.

7. Ortiz also excepts to the ALJ's denial of its request to submit evidence under the comparative issue of its purportedly superior past broadcast record. *Memorandum Opinion and Order*, FCC 88M-1185, released April 21, 1988. Ortiz presented a threshold showing based on its programming record as licensee of Station WEKO, Cabo Rojo, Puerto Rico, since 1970, and particularly since it changed its format in 1979 to predominantly news and information programming. Ortiz emphasized its daily live community phone-in program, a weekly program with a medical doctor to discuss health issues, a weekly address by the local postmaster on service problems, religious programming, public service announcements, and emergency broadcasts.

8. An applicant may only receive positive credit for an unusually good past record which indicates that such performance will continue in the future. Thus, a record which shows unusual attention to the public's needs and interests such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs may be considered. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 398 (1965). The ALJ concluded that this test had not been met because Ortiz failed to show that the specific ascertained needs of Cabo Rojo were addressed by its specific programs, and because its emergency and public service announcements were minimal service to be expected rather than unusual. Further, the ALJ believed that the other examples cited by Ortiz were insufficient to warrant special credit. We tend to agree with the ALJ that Ortiz's threshold showing fell short in some respects, and also failed to provide a comparison with similarly-sized stations in other markets which might have afforded a better measure of whether its programming was superior. *Cf. Big Bend Broadcasters*, 96 FCC 2d 166, 170-172 (Rev. Bd. 1983), *rev. denied*, FCC 84-645, released December 26, 1984. Nevertheless, there is little question that WEKO's provision of extensive news and informational programming over a number of years is commendable, and its record -- if properly presented -- might very well have resulted in a comparative plus for Ortiz. However, had such credit been awarded to Ortiz, the Commission has made clear that even a substantial preference for past broadcast record would not overcome a significant diversification preference. *See Communications Properties, Inc.*, 92 FCC 2d 45 (Rev. Bd. 1982), *rev. denied*, FCC 83-320, released July 7, 1983, at n. 1; *Hampshire County BroadcastingCo., Inc.*, 99 FCC 2d 600, 606 (Rev. Bd. 1984) (subsequent history omitted). As will be demonstrated below, Rodriguez is entitled to a substantial diversification preference which would outweigh any preference Ortiz might have earned for its past broadcast record.

Comparative Issue

9. The ALJ awarded Rodriguez, which owns no other media interests, a moderate to substantial diversification preference over Ortiz, which is the licensee of WEKO (AM) in Cabo Rajo, Puerto Rico. Cabo Rajo is seven or eight miles from Lajas and within the service area of the proposed Lajas FM station. I.D., paras. 22, 34, 41, 45, & n. 2. Both applicants were awarded 100% full- time integration credit for their respective proposals, but Ortiz's quali-

tative enhancements were deemed to be superior. Ortiz was also awarded a very slight preference for greater overall coverage to well-served areas. On balance, the ALJ concluded that Rodriguez's diversification preference outweighed Ortiz's enhancement credits and coverage advantage. I.D., paras. 44, 45. We concur.

10. The primacy of the diversification factor in the comparative analysis is long-standing and requires no elaboration. *See Policy Statement*, *supra*, 1 FCC 2d at 394-5. Although Ortiz seeks to argue that it should not be "unfairly penalized" for its ownership of WEKO because of the "inferior status" of AM broadcast service in general (Br. at 45), the Commission has not altered its standard comparative treatment of diversification in order "to improve the parlous state of AM radio." *Hampshire County Broadcasting Co., Inc.*, 2 FCC Rcd 198, n. 4 (1987). Ortiz's reliance on Commission policy regarding comparative treatment of owners of AM daytime stations is also unhelpful. WEKO is not a daytime-only station; and even if it were, Ortiz would not be entitled to an enhanced integration preference unless it was willing to divest its AM ownership, which it is not. *See FM Broadcast Assignments*, 101 FCC 2d 638, 646 (1985), *recon. denied*, 59 RR 2d 1221 (1986). The Commission expressly prefers two "voices" rather than one when given that choice, and here, where Ortiz's existing full-service station is located in an adjacent community within the very service area in question, Rodriguez's diversification preference must be deemed substantial. *See Hugh M. McBeath*, 103 FCC 2d 386 (Rev. Bd. 1986), *rev. denied* FCC 86-292, released June 26, 1986; *WFSP, Inc.*, 99 FCC 2d 444 (Rev. Bd. 1984); *KBBS, Inc.*, 91 FCC 2d 115 (Rev. Bd. 1982); *Hassayampa Broadcasting*, 92 FCC 2d 472 (Rev. Bd. 1982), *rev. denied*, FCC 83-295, released June 28, 1983, and cases cited therein. Ortiz had the opportunity to commit to divest the AM if awarded this FM permit, but chose to allow any competitor a preference instead. This paramount comparative preference now accruing to Rodriguez easily outweighs the very small preferences awarded Ortiz for coverage, auxiliary power (I.D., para. 32), and integration enhancements. Although Ortiz seeks to reduce Rodriguez's full-time integration credit to 50% and, as discussed earlier, to receive credit for its past broadcast record, the Commission has made clear in *Communications Properties*, *supra*, that an applicant with substantial preferences for both past broadcast record and integration, as well as a moderate coverage preference, and an auxiliary power preference, would still not prevail over an applicant with a substantial diversification preference based on its provision of a new voice to the proposed community of license. *Accord Hampshire County*, *supra*, 99 FCC 2d at 606. Because Rodriguez would bring a new voice to the Lajas area, whereas Ortiz would not, Rodriguez is the clearly preferable applicant. Thus, it is not necessary to further indulge Ortiz's efforts to prolong this proceeding by consideration of its other purely non-decisional exceptions. [4]

11. ACCORDINGLY, IT IS ORDERED, That the application of Ramon Rodriguez et al. d/b/a Ramon Rodriguez & Associates (File No. BPH-821208AA) for a construction permit for a new FM station in Lajas, Puerto Rico, IS GRANTED; and the application of David Ortiz Radio Corporation (File No. BPH-830722AL) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Pursuant to 47 C.F.R. 0.361(c), Board Chairman Marino, who was not present at oral argument, has read the transcript of oral argument, and has participated in the Board's decision.

[2] Oritz's reliance at oral argument on our holding in *62 Broadcasting, Inc.*, 4 FCC Rcd 1768 (Rev. Bd. 1989) is unavailing. Unlike Rodriguez, the applicant in that case faced issues going *both* to whether it had reasonable assurance of its specified site as well as whether it misrepresented that site's availability. Furthermore, the applicant there conceded that it did not have reasonable assurance of a site at the time the application was filed, whereas Rodriguez, by contrast, attempted in good faith at all times to secure the availability of the site prior to the time he filed his application.

[3] Other matters raised by Ortiz were trivial and properly rejected by the ALJ. Thus, for example, we see no significance in whether or not Rodriguez was informed by a postal employee that stations WEKO, owned by Ortiz, and WMIO, owned by Ortiz's daughter, share the same post office box, or whether or not Rodriguez said the studios of the two stations have a connecting door. As the ALJ held, no useful purpose would be served by exploring these matters further.

[4] Thus, for example, we will not grant Ortiz's request for special integration enhancement credit on the basis of Mr. Ortiz's physical handicap. *See Broadcast Assoc. of Colorado*, 104 FCC 2d 16, 20 (1986); *Webster Baker Broadcasting Co.*, 88 FCC 2d 944, 955 (Rev. Bd. 1982). Similarly, in view of the result herein, it is unnecessary to reach Rodriguez's limited exceptions regarding Ortiz's integration credit and purported interest in WMIO (FM).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-546

In re Application of

PATRICIA B. WAGSTAFF File No. BPH-880107NH

For Construction Permit for a
New FM Station on Channel 260A
in Chase City, Virginia

Appearances

Donald E. Martin and *Spencer W. Weisbroth* on behalf of Patricia B. Wagstaff.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: September 7, 1989; Released: September 14, 1989

PRELIMINARY STATEMENT

1. The *Hearing Designation Order* (DA-88-1897) released December 20, 1988 designated an air hazard issued against Patricia B. Wagstaff ("Wagstaff"), one of two mutually-exclusive applicants. By *Memorandum Opinion and Order* (FCC 89M-429) released February 9, 1989, the applicant West Mecklenburg Broadcasting, Inc. was dismissed with prejudice and the application of Wagstaff retained in hearing status pending resolution of the air hazard issue. On May 2, 1989, Wagstaff amended its application to specify a new antenna site. The amendment was accepted by *Order*, FCC 89M-1481, released May 18, 1989. On August 22, 1989, Wagstaff filed a motion for summary decision seeking resolution of the pending air hazard issue in this proceeding.

2. Wagstaff has received an FAA determination of no hazard to its proposed tower site (Aeronautical Study No. 89 AEA-1184-OE, dated August 16, 1989). The FAA determination is dispositive of the air hazard issue. Consequently, the designated air hazard issue must be resolved in Wagstaff's favor, there being no genuine issue as to any material fact in this proceeding. With the resolvement of the air hazard issue there is no impediment to the grant of Wagstaff's application.

Accordingly, IT IS ORDERED that the Motion for Summary Decision, filed August 22, 1989, by Patricia B. Wagstaff IS GRANTED, and the air hazard issue IS RESOLVED in its favor.

IT IS FURTHER ORDERED, unless an appeal from this Summary Decision is taken to the Commission or the Commission reviews this Summary Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Patricia B. Wagstaff to construct and operate a new FM station on Channel 260A in Chase City, Virginia IS GRANTED and this proceeding IS TERMINATED.[1]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Summary Decision and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-474

In re Applications of

ADVANCED BROADCAST TECHNOLOGIES, INC. — File No. BPH-870915MC

Board of Trustees of the PENNSYLVANIA STATE UNIVERSITY — File No. BPED-870916MD

For Construction Permit for a New FM Station on Channel 233A, State College, Pennsylvania

Appearances

Jonathan W. Emord, Esq. on behalf of Advanced Broadcast Technologies ("Advanced") and *Neal J. Friedman*, Esq. on behalf of the Board of Trustees of the Pennsylvania State University ("Penn State").

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: September 7, 1989; Released: September 14, 1989

PRELIMINARY STATEMENT

1. This proceeding was designated for hearing by *Hearing Designation Order* ("HDO"), DA 88-1458, released October 4, 1988. Originally, four applications were designated for hearing. The applications of Destiny Communications, Inc. (FCC File No. BPH-870915MD) and American Indian Broadcast Group (FCC File No. BPH-870915MB) were dismissed pursuant to a settlement agreement with Advanced.

2. The HDO, in addition to the standard comparative issue, designated an air hazard issue against Advanced.

3. A pre-hearing conference was held on December 16, 1988. The hearing session was held on May 15, 1989. The record was closed on May 15, 1989.

FINDINGS OF FACT

Air Hazard Issue - Advanced

4. The Federal Aviation Administration ("FAA") issued a Determination of No Hazard for a structure of 90 feet (27.4 meters) above ground and an ERP of 0.942 kilowatts on April 24, 1989 (Advanced Exh. 4).

COMPARATIVE ISSUES

Advanced

5. Advanced is a corporation organized under the laws of Georgia. Its certificate of incorporation was issued by the Secretary of the State of Georgia on January 21, 1985 and the corporate stock in Advanced was issued on January 25, 1985 (Advanced Exh. 1).

6. Lynn A. Deppen is the sole stockholder in Advanced, holding 500 shares of common voting stock in the corporation. He is also Advanced's only director, its Treasurer and its President. Advanced's local lawyer, Ms. Pepi Friedman, is the only other officer in Advanced. She is the Secretary of the corporation (Advanced Exh. 1).

7. If Advanced's application is granted, Mr. Deppen will work full-time at the proposed station on a day-to-day basis (a minimum of forty hours per week, eight hours per day). He will serve as the proposed station's General Manager. As General Manager, he will create all policies governing station management and operation. He will supervise all station departments and department managers, including the sales, engineering, bookkeeping, traffic, programming, production and news departments and department managers. He will ensure proper coordination among all station departments. He will have exclusive authority to hire and fire all station personnel (Advanced Exh. 1, pg. 1).

8. Mr. Deppen resided in Beech Creek, Pennsylvania for approximately on year in 1978. That part of Beech Creek in which he resided is within the secondary service contour area (1 mV/m service contour) of Advanced's proposed station (Advanced Exh. 2, pg. 2).

9. Advanced does not claim enhancement credit for civic participation.

10. Advanced does not claim enhancement credit for minority and female ownership.

11. Mr. Deppen served as a full-time employee of Lock Haven Broadcasting Corporation, licensee of WBPZ(AM)/WWZU(FM), Lock Haven, Pennsylvania, Taft Broadcasting, licensee of WGR(AM)/WRLT(FM), Buffalo, New York and Plough Broadcasting Company, licensee of WKRL(FM), Clearwater, Florida.

12. From September of 1984 to June of 1985, Mr. Deppen worked on a full-time basis as an engineering consultant. From June of 1985 to the present, he has been consulting on a part-time basis. Since September of 1984, he has provided technical engineering advice to applicants and licensees of over 30 radio facilities (Advanced Exh. 2, pg. 3).

13. From June of 1985 to the present, Mr. Deppen has been employed full-time, forty or more hours per week, as the Corporate Director of Engineering for Keymarket Communications, licensee of KKMJ(FM), Austin, Texas; KOKE(AM), Rollingwood, Texas; WNNK(FM), Harrisburg, Pennsylvania; WEZC(FM), Hickory, North Carolina; WRVR(AM)/FM), Memphis, Tennessee; WTCB(FM), Orangeburg, South Carolina; and WYOM(AM)/WKRZ(FM), Wilkes-Barre, Pennsylvania.

14. Mr. Deppen possesses a General Radiotelephone Operator License (Licensee No. PG-3-9140) and has held this license from January 2, 1985 to present. From the spring of 1977 until January 2, 1985, he held a First Class Radiotelephone Operator License (License No. P1-4-7444 and P1-3-17877) (Advanced Exh. 2, pg. 4).

15. Advanced seeks credit for its proposal to use auxiliary power generators at Advanced's main studio and transmitter sites to ensure continuous station operations in the event of a power outage (Advanced Exh. 1).

16. Neither Advanced nor Mr. Deppen has any cognizable interest in any medium of mass communication (Advanced Exh. 5).

Penn State

17. The Board of Trustees of the Pennsylvania State University is the governing body of the Pennsylvania State University (Penn State Exh. 1). The University is a Pennsylvania non-profit corporation created by act of the Pennsylvania General Assembly in 1855 (Id.).

18. None of the members of the Board of Trustees will be integrated into management of the proposed station on a full-time basis (Id.).

19. The Board of Trustees is the licensee of non-commercial Class D educational station WPSU(FM), State College, Pennsylvania; non-commercial television station WPSX(FM), Clearfield, Pennsylvania; and WPSE(AM), Erie, Pennsylvania (Id.). Collegian, Inc., a wholly-independent Pennsylvania corporation, is the publisher of *The Daily Collegian*, the student newspaper. The Board of Trustees provides funds to Collegian, Inc., but has no attributable interest in and no control of Collegian, Inc. *(Id.)*.

20. Penn State proposes to provide auxiliary power to maintain service in the event of an emergency (Penn State Exh. 2).

CONCLUSIONS OF LAW

Air Hazard Issues - Advanced

21. The FAA Determination of No Hazard is dispositive of the air hazard issue specific against Advanced and the issue IS RESOLVED in its favor.

COMPARATIVE ISSUES

Diversification

22. *Advanced*. Neither Advanced nor Mr. Deppen has any attributable media interests.

23. *Penn State*. The Board of Trustees of Pennsylvania State University is already the licensee of a Class D educational station, WPSU(FM) in State College, Pennsylvania. Furthermore, the Board of Trustees is the licensee of non-commercial station WPSX(TV), Clearfield, Pennsylvania; and WPSE(AM), Erie, Pennsylvania.

24. The Commission has determined that an interest in a non-commercial facility is of significance in a diversification analysis. *See Talleyrand Broadcasting*, 103 FCC 2d 476, 478 (Rev. Bd. 1985) (an interest in a non-commercial station is a cognizable media interest under Commission policy). The Commission has also determined that, in the comparative context, an applicant, like Penn State, which owns media interests in the principal community proposed to be served must receive a significant diversification demerit. *See Hampshire County Broadcasting Co. Inc.*, 65 RR 2d 567 (1988); *see also San Joaquin Television Improvement Corp.*, 96 FCC 2d 617, 618-622 (Rev. Bd. 1984).

25. Consequently, Penn State must be assessed a significant diversification demerit for its total control of an FM facility within State College, Pennsylvania, and, additionally, for its total control of two other broadcast facilities, one of which may be operated in a commercial manner.

Best Practicable Service to the Public

26. *Advanced*. Advanced is entitled to 100 percent full-time integration credit. The record evidence is uncontroverted on the point.

27. Advanced is entitled to a slight enhancement for Mr. Deppen's one year of past service area residence and for his proposed future service area residence. *See, e.g., Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485 (Rev. Bd. 1984).

28. Advanced's integration commitment is enhanced by the substantial past broadcast experience of Mr. Deppen. Mr. Deppen has been employed in broadcast positions since 1977, twelve consecutive years. Moreover, in approximately five of those years, he served in management-level positions. Such a lengthy period of direct broadcast experience is deserving of full credit. *See, e.g., James and Sharon Deon Sepulveda*, 64 RR 2d 647 (Rev. Bd. 1988); *Massillion Broadcasting Co., Inc.*, 2 RR 2d 409 (1964).

29. In light of its proposal to maintain auxiliary power operations at its main studio and its transmitter sites, Advanced is entitled to a slight preference. *See Gilbert Group, Inc.*, 50 RR 2d 87 (Rev. Bd. 1981).

30. *Penn State*. Having proposed no integration, Penn State is not entitled to any integration credit and will receive none. In light of its proposal to maintain auxiliary power operations, Penn State is entitled to a slight preference. *See Gilbert Group, Inc., supra.*

ULTIMATE CONCLUSIONS

31. Only Advanced has proposed quantitative integration in this comparative contest. Penn State suffers a significant diversification demerit, proposes no integration, and has an entitlement to only a slight preference for auxiliary power (which is matched by Advanced's own auxiliary power proposal).

32. Advanced is the clear winner. The public interest is, therefore, served by a grant of Advanced's application.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Advanced Broadcast Technologies, Inc. (File No. BPH-870915MC IS GRANTED, and the application of the Board of Trustees of the Pennsylvania State University (File No. BPED-870916MD) IS DENIED.[1]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

SPECTRADYNE, INC. File No. 901205

for consent to transfer of control

ORDER

Adopted: September 6, 1989; Released: September 14, 1989

By the Chief, Land Mobile and Microwave Division:

INTRODUCTION AND BACKGROUND

1. Spectradyne, Inc. (Spectradyne) is a publicly held corporation that provides microwave distribution of movies as well as other videoservices to hundreds of hotels throughout the United States. Its assets include 242 receive-only earth stations as well as the Operational Fixed Microwave Service (OFS) stations that are the subject of this waiver request. Spectradyne has 67 constructed OFS stations, as well as one unconstructed modified station, one unconstructed new station and four pending applications for modified and new station authorizations. The captioned application requests consent to the transfer of control of Spectradyne from the current shareholders of SPI Holding, Inc., to DP Acquisition Corporation. Spectradyne seeks a waiver of Section 94.47(b) of the Commission's Rules, 47 C.F.R. § 94.47(b), which prohibits assignment or transfer of an OFS station license prior to construction of the facility.

PLEADING

2. In support of its request, Spectradyne submits that the transfer of control of its two unconstructed stations and four pending applications is incidental to the overall transfer of control of Spectradyne. The nature of its service - the distribution via the OFS of movies and other video products to hotels throughout the United States - requires continual modification and upgrading of equipment to meet changing customer demands on a timely basis. Spectradyne states that disallowing transfer of the unconstructed stations and pending applications would have the deleterious effect of disrupting both Spectradyne's timetable for meeting those demands and the service continuity that it seeks to maintain through the proposed transfer.

DISCUSSION

3. The underlying rationale for prohibiting transfers of control of unconstructed OFS facilities is to prevent trafficking in OFS licenses.[1] In this case there is no question of trafficking, as the transfer of control of Spectradyne's two unconstructed stations is incidental to the transfer of the 67 constructed OFS stations and the 242 constructed receive stations of its system. Permitting substitution of DP Acquisition Corp. in the pending applications would permit the transition between corporate owners to take place with a minimum of disruption. A waiver of the prohibition on transfer of control prior to construction is therefore warranted.

4. Spectradyne has shown a unique need in this case and appears to have no other alternative within the Rules. The transfer would not undermine the purpose of the Rule, which is to prevent trafficking in OFS licenses. We therefore find the proposed transfer of control of unconstructed stations would serve the public interest. *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

ORDERING CLAUSE

5. Therefore, pursuant to Sections 0.331 and 1.3, 47 C.F.R. §§ 0.331 and 1.3, Spectradyne's request for waiver of Section 94.47 (b) is GRANTED. Spectradyne's pending applications will be processed routinely.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile & Microwave Division

FOOTNOTE

[1] *See* Private Carrier Systems, FCC 85-53, 57 R.R.2d 1486, 1506-7 n.53 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

South Central Bell Telephone
Company and Southern Bell
Telephone and Telegraph Company

Plan for Comparably Efficient
Interconnection of Enhanced
Service Providers for
Synchronous Protocol
Processing Services

MEMORANDUM OPINION AND ORDER

Adopted: September 6, 1989; Released: September 14, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On August 19, 1988, pursuant to the requirements the Commission adopted in the *Computer III* proceeding,[1] South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth) filed a Comparably Efficient Interconnection (CEI) plan for Synchronous Protocol Processing Services. In February 1989, the Bureau conditionally approved BellSouth's CEI plan for protocol processing services.[2] On May 24, 1989, BellSouth filed an Amendment to its CEI plan for protocol processing services. In its Amendment, BellSouth seeks authorization to provide protocol conversion services in association with its central office based local area network (CO LAN) service. No comments were filed on the Amendment, and only BellSouth filed a reply. In this Order, we approve the Amendment, subject to certain conditions.

II. THE PLAN

A. *Service Description*

2. BellSouth states that CO LAN service is a data offering that permits communication among personal computers, business terminals and hosts, as well as other data networks. [3] In contrast to a premises-based system, CO LAN service performs the switching for the customer's terminals and networks at the telephone company central office, thereby eliminating the need for customers to maintain switching equipment on their own premises.[4]

3. BellSouth states that the asynchronous communications from customer-premises personal computers will be transmitted over local exchange network access lines.[5] When BellSouth provides protocol conversion, the communication from the CO LAN switch to the protocol converter will be through "tariffed RS-232 links."[6] Regardless of whether protocol conversion is required, the communication between the central office and the customer premises will be through tariffed digital data lines.[7] Customers using CO LAN service can obtain data-over-voice (DOV) multiplexing at the same tariffed rate regardless of whether any required protocol conversion is provided by BellSouth or a competitor.[8]

B. *Proposed CEI Arrangements*

4. BellSouth plans to offer protocol conversion services in connection with its CO LAN services on an unseparated basis.[9] BellSouth states that all of the basic CO LAN services to be used in providing protocol processing services will be unbundled from other service offerings and available in existing tariffs.[10] BellSouth proposes to charge itself the same tariffed rates charged other enhanced service providers (ESPs) for the basic services used in association with the enhanced protocol conversions described in the Amendment.[11] BellSouth also states that it will use the standard published interfaces associated with the tariffed services for interconnection between CO LAN service and customer premises or other service providers.[12] Customer access to BellSouth's protocol conversion service will be the same as access to competitors' services provided in conjunction with CO LAN service.[13] BellSouth states that it will satisfy all the the other nonstructural safeguards in the manner previously described in its original plan for protocol processing services which the Bureau approved subject to certain conditions.[14]

III. DISCUSSION

5. *Computer III* requires a Bell Operating Company (BOC) that wishes to offer an enhanced service on an unseparated basis to submit and obtain approval of a CEI plan for that service prior to implementation of Open Network Architecture (ONA). When the service offering is altered, the BOC is required to notify the Commission. In this Order, we approve BellSouth's Amendment subject to the conditions described in the *BellSouth Order*.[15]

6. In the *BellSouth Order*, the Bureau found that BellSouth's initial Plan for protocol conversion complied with the CEI parameters, CEI pricing requirements, and the other nonstructural safeguards described in the *Phase I Order*.[16] Based on the information provided in the Amendment, we conclude that BellSouth has satisfied these requirements with respect to the provision of protocol processing service in conjunction with CO LAN service, and we therefore approve the Amendment. We find that BellSouth has satisfied each of the CEI parameters and the CEI pricing requirements. Although BellSouth does not specifically discuss the other nonstructural safeguards involving cost allocation, Customer Proprietary Network Information (CPNI), non-discrimination reporting, and network information disclosure, it states that it will satisfy these requirements in the manner described in its previously approved plan.[17] We find this assurance to be sufficient for the purposes of this amendment.

IV. ORDERING CLAUSES

7. IT IS HEREBY ORDERED, that pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, 218, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 205, 218, and 405,

and 5 U.S.C. §553, BellSouth's Amendment to its CEI Plan for Protocol Processing Services IS APPROVED, subject to the conditions described herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Section 64.702 of the Commission's Rules and Regulations (*Third Computer Inquiry*), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration*, FCC 89-226, released August 1, 1989 (*Phase I Second Further Reconsideration*), *appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and sub nom. Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order, 2 FCC Rcd 3072 (Phase II Order), modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration*), *further reconsideration*, FCC 89-226, released August 1, 1989 (*Phase II Further Reconsideration*), *appeal pending sub nom. California v. FCC*, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988).

[2] *See* South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company Plan for Comparably Efficient Interconnection of Enhanced Services Providers for Synchronous Protocol Processing Services, 4 FCC Rcd 1560 (1989) (BellSouth Order).

[3] BellSouth Amendment at 4.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 5.

[7] *Id.* at 5-6. The CO LAN network architecture, both with and without protocol conversion, is shown in Figure 1 of the Amendment.

[8] *Id.* at 4-5, n.7. BellSouth states that this satisfies the requirement that it provide DOV at nondiscriminatory terms and conditions. *Id.* at 5, n.7.

[9] *Id.* at 4.

[10] *Id.* at 6-7. BellSouth states that the basic CO LAN services to be used with protocol conversion will be available to BellSouth and all other users at the same locations and at the same time.

[11] *Id.* at 8. BellSouth states that this satisfies its CEI requirements concerning minimization of transport costs and CEI pricing.

[12] *Id.* at 6.

[13] *Id.* at 8. BellSouth states that the circuit assignment, installation, maintenance, and repair procedures approved in the BellSouth Order will ensure that all circuits meet the same preestablished technical standards, and that all customers receive nondiscriminatory maintenance, installation and repair service.

[14] *Id.* at 6, n.10.

[15] *See BellSouth Order* at paras. 8-9.

[16] *Phase I Order*, 104 FCC 2d at 1019-1059.

[17] *Id.* at 6, n. 10. BellSouth notes that it has not yet selected the type of multiplexer it will use in its arrangement. Once a decision has been made, BellSouth must, as it recognizes, comply with the applicable network information disclosure requirements prior to offering CO LAN protocol processing services. *Id.* at 5, n. 8.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

O.R. ESTMAN d/b/a
SATELLITE PAGING

Request for Stay of Lottery, PMS 31 regarding Applications For new frequency 931 MHz for station KNKK333 at Branchville and Manahawkin, New Jersey; File No. 21057-CD-P/ML-01-89

For new frequency 931 MHz for station KNKJ922 at Martinsville and Alpine, New Jersey; File No. 21068-CD-P/ML-01-89

For new frequency 931 MHz for station KNKJ333 at Burlington, New York and Allentown, New Jersey. File No. 21060-CD-P/ML-01-89

r. f. COMMUNICATIONS COMPANIES

Request for Stay of Lottery, PMS 31 regarding Applications For 900 MHz facility at Boston, Massachusetts; File No. 23951-CD-P/L-01-89

For 900 MHz facility at New York, New York; File No. 23958-CD-P/L-01-89

For 900 MHz facility at Philadelphia, Pennsylvania File No. 23966-CD-P/L-01-89

MEMORANDUM OPINION AND ORDER

Adopted: August 23, 1989; Released: August 23, 1989

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. On July 17, 1989, the Commission issued a Public Notice, Mimeo No. 3642, announcing that Lottery No. 31 for 900 MHz paging frequencies in the New York Metropolitan Area would be held on August 23, 1989. r.f. Communications Companies ("r.f. Communications") and O.R. Estman, d/b/a Satellite Paging ("Satellite Paging") (collectively "Petitioners") submitted letters to the Commission on July 19, 1989, requesting that their applications be placed in the lottery. They were informed by the Mobile Services Division (MSD) that their applications were not filed within the 60-day "cut-off" period and would not be included in Lottery No. 31. Five other applicants did file within the 60-day "cut-off" period and will be included in Lottery No. 31. On August 3, 1989, Petitioners filed requests for placement in PMS Lottery No. 31 and on August 15, 1989, Petitioners filed petitions for stay of PMS Lottery No. 31. Despite telephonic confirmation that the requests for stay would be acted upon prior to the lottery, Petitioners filed emergency petitions for review on August 17, 1989, in the United States Court of Appeals for the District of Columbia Circuit. Petitioners' requests for stay of PMS Lottery No. 31 were denied on August 18, 1989. *Memorandum Opinion and Order*, DA 89-995 (Mob. Ser. Div. August 18, 1989). For the reasons set forth below, we will deny the requests for placement in PMS Lottery No. 31.

II. CONTENTIONS OF THE PARTIES

2. In their identical requests for placement in PMS Lottery No. 31, Petitioners argue that the MSD did not give sufficient notice to the public of the availability of 900 MHz frequencies, instead establishing an arbitrary cut-off procedure. Petitioners state that their applications were filed on December 13, 1988 (Satellite Paging) and March 3, 1989 (r.f. Communications), that they appeared on Public Notice on April 5, 1989 and these applications should be included in the PMS Lottery No. 31.

III. DISCUSSION

3. In 1982, the Commission decided to assign frequencies to applicants in the 900 MHz frequency band. *See Paging Systems - DPLMRS*, 89 FCC 2d 1337, 1356-57, 1359 (1982). Thirty-seven frequencies are available for 900 MHz local paging service. The Commission does not define service areas. Rather, applications are mutually exclusive when their proposed transmitting sites are within a specified distance of each other and there are insufficient frequencies available for the number of applicants.[1] The Commission's decision to assign frequencies itself was made in order to minimize mutually exclusive situations and to maximize efficient use of the spectrum. *Id* at 1359. After frequencies were initially assigned to applicants in 1983 and 1984, remaining frequencies have been assigned in accordance with the Commission's normal "cut-off" procedure for Public Land Mobile Services (PLMS). Even though public notices for the 900 MHz frequencies do not list a specific frequency, they provide the proposed transmitting site locations of all applications as do all PLMS public notices. The public notice listing of an application triggers a 60-day period for the filing of mutually exclusive applications.[2] The Commission does not issue public notices listing the remaining frequencies available for any of the public land mobile services. All applications to offer service within 70 miles of the first-filed application are considered mutually exclusive when there are more applications filed than there are available frequencies. All applications filed within a 60-day cut-off period of the first-filed application are treated as a "processing group." When there are enough frequencies for all the applications in the processing group, the first filed application is

granted. The next application in the processing group starts a new cut-off period for a new processing group. This process continues until there are more applications than available frequencies in a given processing group. When this occurs, all applications in the processing group are placed in a lottery. 47 C.F.R. Section 22.31(b). After the lottery is held, frequencies are assigned based on the results of the lottery and the locations proposed by the applicants. Since applicants choose their own locations, applications which are mutually exclusive with the first application in a processing group may not be mutually exclusive with all other applications in the processing group. The final outcome thus depends not only on the applicant's place in the lottery but also on the location it proposes to serve. If frequencies are still available after assignments are made to the applicants in the processing group, a new processing group is formed and the applications in this group are processed in accordance with the standard procedures outlined above. *See* Public Notice 4395 (May 24, 1984).

4. Applications filed after the 60-day cut-off period are not eligible for inclusion in the processing group. On June 15, 1988, the Commission issued a public notice of the filing of an application by Page America of New York, Inc. which triggered the formation of a processing group for applications for 900 MHz paging frequencies in the New York City area. Four other applications were filed within 60 days of that public notice, but only four frequencies were available. Thus, Public Notice 3642 (July 17, 1989) was issued which notified the public that applications within that processing group were set for a lottery to be held on August 23, 1989.

5. Consistent with the procedure described above, Petitioners' applications (Satellite Paging was filed on December 13, 1988 and r.f. Communications was filed on March 3, 1989) were placed on public notice shortly after they were filed. However, their applications were not included in the lottery scheduled for August 23, 1989 because they were filed long after the June 15, 1988 public notice that triggered the formation of the processing group which is included in PMS Lottery No. 31, and not within 60 days as required by the Rules. Petitioners' claim that they lacked notice of the cut-off date and other Commission procedures which affected their applications is wholly without merit. The Commission's cut-off procedures for PLMS are well-established in Section 22.31(b) and (c) of the Rules. The Petitioners were given sufficient notice of and are responsible for being aware of these filings. A 1984 Public Notice reminded applicants that the cut-off rule would apply. *See* Public Notice 4395 (May 24, 1984). In these circumstances, we conclude that Petitioners had adequate notice of the cut-off period affecting their applications, that their applications were untimely filed and therefore, will not be placed in PMS Lottery No. 31.

IV. ORDERING CLAUSES

6. IT IS ORDERED, that the requests for placement in PMS Lottery No. 31 filed by r.f. Companies, File Nos. 23951-CD-P/L-01-89, 23958-CD-P/L-01-89, and 23966-CD-P/L-01-89 and O.R. Estman, d/b/a Satellite Paging, File Nos. 21057-CD-P/ML-01-89, 21068-CD-P/ML-01-89, and 21060-DC-P/ML-01-89 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Division

FOOTNOTES

[1] The distance is 70 miles for 900 MHz paging service.

[2] The public notice also triggers a 30-day period for the filing of petitions to deny the application. 47 C.F.R. Section 22.30(a)(4).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-93

In re Application of

SOUTHERN TWIN CITIES AREA RADIO INC. (hereafter Southern Twin) File No. BPH-860317ML

For Construction Permit
For a New FM Station
In Lakeville, Minnesota on Channel 286A

HEARING DESIGNATION ORDER

Adopted: August 30, 1989; Released: September 14, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned application for a new FM station.[1]

2. On February 22, 1988, pursuant to *Old Eureka Broadcasting, Inc.*, 3 FCC Rcd. 1682 (M.M. Bur. 1988) (Hearing Designation Order), Southern Twin was dismissed as inadvertently accepted for filing for proposing a site which was short-spaced to the buffer-zone protection afforded to second adjacent channel station KCLD(FM), St. Cloud, Minnesota.[2]

3. On April 25, 1988, Southern Twin filed an Petition for Reconsideration and Acceptance *Nunc Pro Tunc* arguing that its application was incorrectly dismissed. In *Special Markets Media, Inc.*, FCC 89-233, Released July 27, 1989, the Commission ruled that applicants for construction permits for new FM assignments could have reasonably assumed that the buffer-zone requirement did not apply to them. Therefore, applicants should not have been dismissed for failing to honor the buffer-zone. Consequently, it was ordered that Southern Twin's Petition for Reconsideration be granted and its construction permit application be reinstated.

4. On April 29, 1986, Southern Twin filed an amendment specifying a change in effective radiated power and antenna height above average terrain. Southern Twin's application went on *Public Notice of Tender* on March 26, 1986. Thus, the final day for filing amendments as a matter of right ended on April 28, 1986 pursuant to 47 C.F.R. § 73.3522(a)(6). The amendment is, therefore, late-filed. The amendment is not supported by any Petition for Leave to Amend demonstrating good cause for acceptance. Thus, Southern Twin has failed to establish good cause for the acceptance of its amendment filed subsequent to the amendment as of right period. Accordingly, the amendment will be returned.

5. The tower information submitted by Southern Twin to the Federal Aviation Administration conforms to the tower information in the above returned amendment. The FAA, thus, has not determined whether the antenna proposed by Southern Twin in its original (unamended) application would constitute a hazard to air navigation. Accordingly, an issue with respect to air hazard will be included and the FAA made a party to the proceeding.

6. Except as may be indicated by any issues specified below, the applicant is qualified to construct and operate as proposed. Since the proposal is mutually exclusive with proposals previously designated, it must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the application IS DESIGNATED FOR HEARING AND CONSOLIDATED in the proceeding now in progress in MM Docket 88-93 and upon the same issues, which are:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the following issue be added with respect to Southern Twin only:

3. To determine whether there is a reasonable possibility that the tower height and location proposed by Southern Twin would constitute a hazard to air navigation.

9. IT IS FURTHER ORDERED, That the April 29, 1986 amendment IS RETURNED as late-filed.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicant and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The application filed by Southern Twin is mutually exclusive with five other applications previously designated for a consolidated hearing in MM Docket 88-93.

[2] The "buffer-zone" was an additional 16 kilometers of protection (beyond the minimum distance separation requirement provided for in 47 C.F.R. § 73.207) temporarily afforded Class C stations operating with facilities less than the Class C minimum established in the *Report and Order* in BC Docket 80-90, 94 FCC 2d 152 (1983). The purpose of this extra protection, which was in effect from March 1, 1984 to March 1, 1987, was to allow these stations some flexibility should they need to move in order to meet the Class C minimum. If the protected station did not upgrade within the alloted time, it would be reclassified to a lower Class.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-125
Phase II

In the Matter of

Annual 1985 Access
Tariff Filings

ORDER

Adopted: September 7, 1989; Released: September 12, 1989

By the Chief, Common Carrier Bureau:

1. On June 15, 1989, BellSouth Corporation (BellSouth) filed a request for stay of the effective date for making refunds of $5.1 million in Minimum Monthly Usage Charges (MMUCs) the Commission ordered BellSouth to make in 1987.[1] In its request, BellSouth asks the Commission to stay payment of the MMUC refund until the United States Court of Appeals for the District of Columbia Circuit has ruled on its pending petition for review.[2]

2. On July 2, 1985, local exchange carriers (LECs) filed revised annual interstate access tariffs as directed by Part 69 of the Commission's Rules. *See* 47 C.F.R. Part 69. These revisions changed virtually all their rates, terms, and conditions for both switched and special access. In an Order released September 30, 1985, the Common Carrier Bureau initiated an investigation of these tariff revisions. [3] While the bulk of the proposed rate revisions became effective October 1, 1985, as scheduled, the Bureau suspended, *inter alia*, the LECs' proposed MMUCs for the five-month statutory period pending investigation. On June 6, 1986, the Bureau released an Order designating issues and requesting further justification or information with respect to particular switched access tariff terms and conditions, including MMUCs.[4]

3. In 1987, in the *Terms and Conditions Order*, the Commission evaluated the reasonableness of the LECs' MMUCs and concluded that the MMUCs should be applied based upon the threshold number of minutes contained in the tariffs effective as of July 2, 1985.[5] Citing the carriers' failure to file adequate cost support, the Commission also determined that MMUCs should apply only to local transport charges and should be calculated based only on the cost of dedicated transport.[6] Finally, the Commission ordered the LECs to refund by July 7, 1987, all MMUC overcharges that resulted from any improper application of MMUCs.[7] On June 26, 1987, the Bell Atlantic Telephone Companies filed a request for stay of the MMUC refund requirement pending Commission action on the petitions for reconsideration filed by MCI Communications Corporation, GTE Service Corporation, and New York Telephone Company and New England Telephone and Telegraph Company. The Bureau granted all LECs an extension of time until March 31, 1988, to make refunds of unlawful MMUCs in compliance with the *Terms and Conditions Order*.[8] The refund deadline was subsequently extended several times.[9]

4. On April 27, 1989, the Commission released its *Reconsideration Order* in this proceeding which confirmed the LECs' MMUC refund requirement. Following submission of BellSouth's stay petition, however, the Bureau extended the MMUC refund deadline to September 30, 1989, to allow us time to consider BellSouth's request.[10]

5. We believe it is in the public interest to delay the effective date of the MMUCs refund while BellSouth's petition is pending before the D.C. Circuit. Our decision to grant BellSouth an extension of time, however, in no way affects any of the conclusions the Commission reached in the *Terms and Conditions Order*. In granting this extension, we are merely exercising the equitable discretion given the Commission in Section 4(j) of the Communications Act of 1934, 47 U.S.C. § 154(j).[11] In order to ensure that BellSouth will be in a position to refund the unlawful MMUCs if so required upon completion of the litigation, however, we instruct BellSouth to place $5.1 million, plus accrued interest as stipulated in paragraph 6, *infra*, in an interest bearing escrow account until September 30, 1990. BellSouth must provide the Commission with written documentation by September 30, 1989, demonstrating that it has deposited these funds in such interest bearing escrow account. If BellSouth fails to place these funds in escrow by that date, it must commence payment of the $5.1 million plus accrued interest at the end of the current September 30, 1989, refund deadline.

6. Accordingly, IT IS ORDERED pursuant to Section 4(j) of the Communications Act of 1934, 47 U.S.C. § 154(j), that the BellSouth Corporation is granted an extension of time until September 1, 1990, to make refunds of Minimum Monthly Usage Charges as required by the *Terms and Conditions Order*. Grant of this extension is contingent upon the BellSouth Corporation depositing $5.1 million, plus interest already accrued, in an interest bearing escrow account on or before September 30, 1989, and providing the Commission with written confirmation that such funds have been placed in such account. The simple interest accruing from March 9, 1987, to the date of deposit in escrow, using the current Internal Revenue Service rate, shall be added to the $5.1 million stated above. The same Internal Revenue Service rate shall then be used to compute simple interest from the date of deposit in escrow to the date refunds are finally paid. The cost of administering this account shall be borne by BellSouth Corporation.

7. IT IS FURTHER ORDERED, that the request for stay filed by BellSouth Corporation IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 2 FCC Rcd 1416 (1987) (*Terms and Conditions Order); recon.*, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 3959 (1989) (*Reconsideration Order).*

[2] *See* BellSouth Corporation, *et. al.*, v. FCC, No. 89-1380, (D.C. Cir. filed June 13, 1989).

[3] Annual 1985 Access Tariff Filings, Mimeo No. 7401, released Sept. 30, 1985 (Com.Car.Bur.).

[4] Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, Order Designating Issues for Investigation, Mimeo No. 4963, released June 6, 1986 (Com.Car.Bur.).

[5] *Terms and Conditions Order*, 2 FCC Rcd at 1421.

[6] *Id.*

[7] *Id.*

[8] Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 2 FCC Rcd 7534 (Com.Car.Bur. 1987).

[9] *See* Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 3 FCC Rcd 1973 (Com.Car.Bur. 1988) (June 30, 1988, deadline); Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 3 FCC Rcd 4063 (Com.Car.Bur. 1988) (September 30, 1988, deadline); Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 3 FCC Rcd 5845 (Com.Car.Bur. 1988) (December 30, 1988, deadline); Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 4 FCC Rcd 394 (Com.Car.Bur. 1988) (March 31, 1989, deadline).

[10] *See* Annual 1985 Access Tariff Filings, CC Docket No. 86-125, DA 89-859, released July 24, 1989 (Com.Car.Bur.).

[11] Section 4(j) authorizes the Commission to conduct proceedings "in such a manner as will best conduce to the proper dispatch of business and to the ends of justice."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Tariff F.C.C. No. 9

Transmittal No. 1690

Accunet T1.5, T45, Dataphone Digital Service, and Multiservice Volume Pricing Plan

ORDER

Adopted: September 7, 1989; Released: September 8, 1989

By the Chief, Common Carrier Bureau:

1. On July 10, 1989, American Telephone and Telegraph Company (AT&T) filed the above-captioned transmittal to propose rate revisions for the following services: (1) Accunet T1.5 and T45 Services; (b) Dataphone Digital Service (DDS); and (3) Multiservice Volume Pricing Plan (MSVPP). Petitions to reject or, in the alternative, to suspend and investigate were filed by Communications Transmissions, Inc. (CTI), Competitive Telecommunications Association (CompTel), MCI Telecommunications Corporation (MCI), US Sprint Communications Company Limited Partnership (US Sprint), and Williams Telecommunications Group, Inc. (WTG) on July 25, 1989. The National Telecommunications Network (NTN) filed a petition to suspend and investigate on that same day. AT&T filed a reply on August 4, 1989, urging the Commission to deny all of the above petitions. Transmittal 1690 is scheduled to become effective on September 9, 1989.

2. All petitioners, except MCI, assert that AT&T has failed to provide the appropriate cost support data in violation of Section 61.49 of the Commission's Rules, 47 C.F.R. § 61.49. CTI Petition at 3-5; Comptel Petition at 3-4; NTN Petition at 5-11; US Sprint Petition at 2-7; WTG Petition at 4-9. CTI claims that AT&T's rate revisions are predatory because AT&T has divided its common plant such that it fails to distinguish between the cost of a channel provided under the Business Basket and the cost of the same channel provided under the Residential Basket. CTI Petition at 6-8. NTN avers that the proposed revisions will cause substantial harm to the marketplace if these revisions are allowed to take effect. NTN Petition at 11-12. MCI asserts that the transmittal is vague and ambiguous because AT&T does not clearly define the third of three options offered to MSVPP customers in those situations in which the customers cannot meet their monthly commitments. MCI Petition at 4-6. Finally, US Sprint argues that the proposed decreases for MSVPP rates should not be offered to customers who do not meet their monthly commitment. US Sprint Petition at 7-8.

3. AT&T asserts that it has fully complied with the Commission's filing requirements. AT&T Reply at 4-12. Specifically, AT&T argues that it has provided the Commission with all of the information required to satisfy the average variable cost (AVC) standard promulgated in Section 61.49(d) of the Commission's Rules, 47 C.F.R. § 61.49(d). *Id.* at 5. Furthermore, AT&T contends that its demand and revenue forecasts are adequate under Commission's cost support requirements. *Id.* at 10. Finally, on September 6, 1989, AT&T filed, at the request of the Bureau, additional information to support Transmittal 1690's proposed rate revisions.[1]

4. The Common Carrier Bureau has reviewed the tariff transmittal and the various pleadings. We conclude that no compelling argument has been presented that the tariff proposal is patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

5. Therefore, IT IS ORDERED that the petitions to reject or to suspend and investigate filed by Communications Transmissions, Inc., Competitive Telecommunications Association, MCI Telecommunications Corporation, US Sprint Communications Company Limited Partnership, and Williams Telecommunications Group, Inc., and the petition to suspend and investigate filed by the National Telecommunications Network, against AT&T Communications, Tariff F.C.C. No. 9, Transmittal No. 1690, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] Letter of Sept. 6, 1989, from C.E. Links, AT&T, to Chief, Tariff Division, Common Carrier Bureau.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Revisions to Tariff F.C.C. Nos. 9 and 11 — Transmittal No. 1761

ORDER

Adopted: September 7, 1989; Released: September 8, 1989

By the Chief, Common Carrier Bureau:

1. On August 29, 1989, AT&T Communications (AT&T) filed Transmittal No. 1761, which introduces a nationwide promotion for its Megacom 800 customers. Specifically, the transmittal proposes to waive the installation charges for Terrestrial 1.544 mbps local channels and the access coordination function, as well as the installation charge for the central office connection, for customers who order Megacom 800 service between September 11, 1989, and October 19, 1989, and request installation by December 19, 1989. Customers must subscribe to Megacom 800 service for a minimum of six months and maintain an average monthly usage revenue level of at least $2500 per routing arrangement for this six-month period. US Sprint Communications Company Limited Partnership (US Sprint) filed a petition to reject or suspend and investigate Transmittal No. 1761.[1] The tariff is scheduled to become effective on September 11, 1989.

2. According to US Sprint, this transmittal replaces AT&T Transmittal No. 1717, filed August 2, 1989. US Sprint maintains that the only difference between the transmittals is that AT&T lowered the average monthly usage requirement from $5000 to $2500. In addition, US Sprint alleges that AT&T proposes to change the "ordering window" for Transmittal 1717 to September 11, 1989, to coincide with the effective date of the transmittal because AT&T anticipates that customers will not order service under the existing promotion after the start date of the new promotion due to the lower monthly usage revenue requirements being introduced. US Sprint Petition at 1-2. US Sprint also alleges that the transmittal constitutes a restructured service, as defined in the Commission's *Price Cap Order*.[2] Furthermore, US Sprint maintains that the Commission indicated that restructured services raise issues of discrimination and the possibility of anticompetitive behavior which requires more than 14 days to address, and therefore prescribed a 45-day notice period for tariffs proposing restructured services. US Sprint Petition at 2-3.

3. The Common Carrier Bureau has reviewed Transmittal 1761, the description and justification supporting it, and US Sprint's petition. We conclude that no compelling argument has been presented that the proposed tariff revisions filed by AT&T are patently unlawful so as to require rejection or that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to reject or, alternatively, to suspend and investigate AT&T Communications, Tariff F.C.C. Nos. 9 and 11, Transmittal No. 1761, filed by US Sprint Communications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] US Sprint Petition To Reject or, Alternatively, Suspend and Investigate, (US Sprint Petition), filed Sept. 5, 1989.

[2] Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rule Making, CC Docket No. 87-313, 4 FCC Rcd 2873, 3123 (1989) (*Price Cap Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications
Revisions to Tariff F.C.C. No. 12

Custom-Designed Integrated Services

Transmittal Nos. 1696 and 1776

ORDER

Adopted: September 7, 1989; Released: September 8, 1989

By the Chief, Common Carrier Bureau:

1. By Transmittal No. 1696, AT&T Communications (AT&T) proposes to revise its Tariff F.C.C. No. 12 to establish a high-capacity service to provide "focussed promotional calling" (FPC). FPC would be provided both as a general offering in the context of Virtual Telecommunications Network Service (VTNS), and as an adjunct to existing arrangements provided under VTNS Option III.[1] The transmittal was filed July 12, 1989, and is scheduled to become effective on September 13, 1989.[2] A petition to investigate was filed by MCI Telecommunications Corporation (MCI) on July 12, 1989; AT&T replied on August 7, 1989.

2. AT&T's proposal would modify the general regulations of Tariff 12 to introduce Promotional Port Access Telephone Numbers and a High Volume Calling Capability employed in association with these numbers. The promotional numbers would be used by customers who receive a high volume of calls associated with marketing promotions, opinion polls, and similar undertakings, generally conducted during a limited period of time. The high volume capability would provide a specific telephone number with the ability to receive calling volumes as high as 125 calls per second for pre-arranged periods and geographic areas. Description and Justification (D&J) at 3. The aggregate, national capability of the public switched network to handle such atypical call patterns is limited, so special ordering procedures are necessary to establish priorities in the case of conflicting service orders.

3. MCI contends that VTNS constitutes an alternative rate structure that allows AT&T to discount standard service offerings to favored customers, enabling AT&T to compete against its competitors without reducing revenues from its standard offerings. MCI Petition at 2-3. MCI also asserts that the high volume calling capability proposed for VTNS Option III has counterparts in both the Megacom 800 Service and Multiquest Service tariffs; however, while those services charge 6 cents per call, the rate applied to the VTNS Option III customers would range from 2 to 4 cents per call depending on volume. *Id.* at 4-5. [3]

4. AT&T replies that MCI has reiterated its contention that integrated service packages provided under Tariff 12 are "like" the counterpart, component capabilities included in the custom-designed network, despite the Commission's contrary determination in the *April 18 Order*.[4] AT&T asserts that the integration of FCP capability into the existing VTNS Option III network and the customer's substantial financial commitment over the service term allow economies reflected in VTNS pricing elements, which distinguish that arrangement from the component offerings MCI uses for rate comparisons. AT&T Reply at 2-3.

5. The Common Carrier Bureau has reviewed AT&T's Transmittal 1696, the petitioner's assertions, and related pleadings. We conclude that no compelling argument has been presented that the proposed tariffs are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject or to suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal 1696, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The FPC term is used to encompass both the arrangements described in the captioned transmittal under AT&T Tariff F.C.C. No. 12, and corresponding component offerings provided under AT&T Tariff F.C.C. Nos. 1 and 2, submitted under Transmittal 1689 and scheduled to become effective simultaneously. Whether provided as component services or as part of a integrated service package, focussed promotional calling involves the characteristics described *infra* at paras. 3-5.

[2] Transmittal No. 1776 was filed on September 5, 1989, with a scheduled effective date of September 10, 1989, and proposed revisions as a result of discussions with Commission staff to clarify various aspects of the offering.

[3] An MCI letter to the Chief, Common Carrier Bureau, received August 15, 1989, notes accounts in the general press of a joint venture between AT&T and the American Express company, the customer for VTNS III, and argues that as a partner in that "Call Interactive" enterprise, AT&T would directly and substantially benefit from price reductions available only to the venture. We are accepting the supplemental pleading under Section 1.45 of the Commission's Rules, 47 C.F.R. § 1.45.

[4] AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568, Memorandum Opinion and Order, 4 FCC Rcd 4932, 4939 n.70 (1989) (*April 18 Order); recon. pending.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION,
Complainant,
v. File Nos. E-89-88 through E-89-110

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, et al.,
Defendants.

ORDER

Adopted: September 8, 1989; Released: September 8, 1989

By the Chief, Common Carrier Bureau:

1. Before the Bureau is a motion filed on September 5, 1989 by MCI Telecommunications Corporation requesting that the Commission compel the production of certain documents and extend the time period allotted for discovery in the above-captioned proceedings by thirty days.

2. In support of its motion to compel documents, MCI alleges that the Ameritech and Bell Atlantic Operating Companies have failed to respond to an MCI request[1] for missing data and coding information that were not included in the Article 3 and Article 4 Shared Network Facilities Agreements (SNFAs) and related documents that were produced earlier. In addition, MCI alleges that Ameritech, Bell Atlantic, and BellSouth Operating Companies have failed to produce certain documents that were covered by an agreement between the parties on or about August 3, 1989. As support for its request for additional time, MCI points to actions on the part of the Commission, as well as the defendants, which it claims have contributed to delays in the discovery process. MCI claims that these actions have handicapped its conduct of discovery, have prevented it from determining whether additional discovery or depositions are necessary, and have delayed a complete analysis of the SNFAs in the preparation of its direct case. MCI also argues that under the present circumstances, the Commission will not have a proper record on which to base its decision.

3. We have consistently expressed to the parties our determination that discovery proceed expeditiously and on schedule. We have held several status conferences and have issued a protective order in furtherance of this goal. Nonetheless, impediments to the conduct of discovery have occurred. We note that Bell Atlantic, Ameritech, and to some extent, BellSouth are the only parties who appear not to have fully complied with MCI's discovery requests for materials listed in the motion to compel which is the subject of this order. In balancing our interest in moving these complaints forward with our concern that MCI be afforded adequate opportunity to pursue its complaints, we are inclined to grant MCI's motion to compel. However, we are reluctant to do so absent a response from these parties to MCI's motion to compel. Therefore, unless Bell Atlantic, Ameritech and BellSouth file, within three days of the release date of this order, pursuasive reasons to deny MCI's motion to compel, they are directed to provide the information and documents referred to in MCI's motion not later than seven days from the release date of this order.

4. As for MCI's motion for an extension of time, we note that the Commission's general policy is that "extensions of time shall not be routinely granted." 47 C.F.R. § 1.46(a). However, in view of the delays that have consumed portions of the discovery period, we will extend the discovery period in these proceedings by thirty days. We are taking these actions on our own motion, in advance of the time for filing responses to MCI's motion, because of the imminent termination of the discovery period as originally scheduled.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the "Motion to Compel and Motion for Extension of Time for Discovery" filed by the MCI Telecommunications Corporation on September 5, 1989, IS GRANTED to the extent indicated herein.

6. IT IS FURTHER ORDERED that the close of the discovery period in the above-captioned proceeding is extended from September 13, 1989 to October 13, 1989.

7. IT IS FURTHER ORDERED that, because of our action herein, the time for filing complainant's direct case in the above-captioned proceedings is extended from October 13, 1989 to November 13, 1989, and that the time for filing defendants' responses and reply cases is extended from November 13, 1989 to December 13, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] By letters dated August 4, 1989 to Bell Atlantic and August 8, 1989 to Ameritech.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166
Phase I

In the Matter of

Investigation of Special Access
Tariffs of Local Exchange Carriers

ORDER

Adopted: September 8, 1989; Released: September 8, 1989

By the Chief, Common Carrier Bureau:

1. By a separate Order released today, this Bureau granted a motion for extension of time for discovery filed by MCI Telecommunications Corporation (MCI),[1] extending the time permitted for discovery in certain MCI complaint proceedings, File Nos. 89-88 through 89-110, to October 13, 1989. In addition, we extended the deadlines for filing direct cases and reply cases in those proceedings to November 13, 1989, and December 13, 1989, respectively.

2. Many of the parties participating in this investigation are also parties to one or more of the complaints that are the subject of our companion Order. We believe that the public interest would be best served by enabling these parties to participate fully in both of these separate proceedings. We conclude that, in order to achieve this result, these two proceedings should continue to be conducted on parallel time tracks. We therefore will extend, on our own motion, the deadlines previously established for submission of additional pleadings in the captioned investigation of the BOCs' special access tariffs in CC Docket No. 85-166. Currently, oppositions to the direct cases filed in that investigation are due to be filed October 13, 1989.[2] We extend the deadline for filing oppositions to the direct cases to November 13, 1989. Replies to the oppositions are currently due November 13, 1989. [3] We extend the deadline for filing replies to December 13, 1989.

3. Accordingly, IT IS ORDERED that oppositions to the direct cases in the captioned proceeding SHALL BE FILED not later than November 13, 1989.

4. IT IS FURTHER ORDERED that replies to the oppositions to the direct cases in the captioned proceeding SHALL BE FILED not later than December 13, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] MCI Telecommunications Corp. v. Bell Telephone Co. of Pennsylvania, *et al.*, DA 89-1089, released Sept. 8, 1989 (Com.Car.Bur.)

[2] *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, DA 89-1058, released Sept. 5, 1989 (Com.Car.Bur.).

[3] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MMM HOLDINGS, INC. File Nos. BTCCT-890615KF et al.
03342-CL-TC-89 et al.
3382-CF-TC-89 et al.
1641-DSE-TC-89 et al.

for Transfer of Control of
LIN BROADCASTING
CORPORATION

MEMORANDUM OPINION AND ORDER

Adopted: August 31, 1989; Released: August 31, 1989

By the Deputy Chief, Common Carrier Bureau and Acting Chief, Mass Media Bureau:

1. This proceeding involves a complicated, fiercely contested, corporate takeover battle. Both contestants currently hold common carrier and television broadcast licenses and thus presumptively satisfy the financial, character, and other criteria ordinarily associated with Commission licensing. While all of the claims, counterclaims, contentions, and assertions of the various parties to this controversy have been carefully weighed and considered, for the reasons discussed below, no good reason has been shown for the Commission significantly to depart from its longstanding policy of strict neutrality and hence minimal intervention into the marketplace for corporate control.

2. The essential facts upon which this reasoned judgment is based are as follows. McCaw Cellular Communications, Inc. ("McCaw"), through its wholly owned subsidiary, MMM Holdings, Inc. ("MMM Holdings"), seeks control of LIN Broadcasting Corporation ("LIN") by hostile tender offer. LIN holds licenses for cellular facilities in five major cities, for seven television stations, and for related auxiliary facilities. McCaw operates cellular and paging systems throughout the country, and claims to be the largest nonwireline cellular operator in the world, based on market capitalization. Because of the hostile nature of the transaction and the need for expedition, McCaw filed applications to transfer control of LIN first to a trustee for MMM Holdings on a temporary basis (the STA request), and then to MMM Holdings.[1] Because of the circumstances in this case, the Commission is able to act on the "long-form" application for transfer to MMM Holdings at this time, and there is no need to consider the STA request. Consequently, the long-form applications are hereby constructively amended to provide for the transfer from LIN directly to MMM Holdings for McCaw, and the STA requests are dismissed. Accordingly, under consideration here are the applications to transfer control of LIN to MMM Holdings, LIN's petition to deny those applications and related pleadings by LIN and McCaw. Also under consideration are "Comments" by BellSouth Corporation ("BellSouth"), a petition to deny filed by a group of agents and resellers of service of the cellular licensee in Houston, Texas ("Houston Agents"),[2] and related pleadings by BellSouth, Houston Agents, and McCaw.[3]

3. LIN challenges McCaw's financial qualifications and its ability to continue operation of LIN's various facilities. At the very least, it contends, the transfer would cause a diminution in the level of service to the public, in the face of which the Commission cannot grant the applications. LIN also argues that a hearing is necessary to determine whether there is a degree of alien influence which would disserve the public. It further contends that an inquiry is necessary to assess the competitive impact of the transfer. It also challenges one of McCaw's directors, arguing that his position violates the cable/television cross-interest statute and rules, and that his character has been put in question as a result of the anticompetitive conduct of a company he runs, which resulted in a substantial civil antitrust judgment against the company. It also contends that McCaw has exhibited a pattern of lack of candor with the Commission in several of its representations in this proceeding.

4. BellSouth is currently a partner with LIN in two markets, and contends that McCaw must address the competitive concerns which arise if it becomes partner with BellSouth in some markets while remaining a competitor in other markets, and that interested parties must be given an opportunity to comment on McCaw's submission. Houston Agents contend that McCaw failed to file required financial information and that certain activities of Houston Cellular, which McCaw seeks to acquire, are unlawful.

PUBLIC INTEREST CONSIDERATIONS

5. *LIN's Contentions:* LIN contends that the requirement of Sections 309(d) and (e) of the Communications Act (47 U.S.C. §§309(d),(e)) that the Commission must find that the public interest, convenience, and necessity will be served before granting a transfer application, demands that the Commission may not grant these applications unless it can determine that service to the public after the transfers would be at least as good as it would be if they did not take place. LIN cites the determination in *Minneapolis Star & Tribune Co.* (" *Wichita - Hutchinson* "), 20 FCC2d 584 (1969), that "a proposed transfer which would result in an inferior service to the public cannot be authorized." *Id.* at 586. LIN presents three additional cases as having involved "issues of similar magnitude" which warranted hearings: the transfer of five UHF stations from D.H. Overmyer to U.S. Communications Corporation in 1967 (" *Overmyer* case"); Turner Broadcasting's attempt at a hostile takeover of CBS's television and radio stations ("Turner/CBS case"); and ITT's proposed acquisition of ABC's television and radio stations ("ABC/ITT merger"). LIN describes at length the ways in which service will be allegedly diminished if McCaw acquires its licenses, primarily as a result of the level of indebtedness McCaw would incur in order to consummate the takeover.

6. *McCaw's Response:* McCaw responds that the explicit terms of Section 310(d) very clearly prohibit the Commission from considering any party but the proposed transferee in making its public interest determination, and it cites specific legislative history in support of its interpretation. It argues that the 1969 *Wichita - Hutchinson* case, should be disregarded, and that if it is not, it should not be applied to consider the effect of the debt assumed in

the proposed transaction on the relative qualifications of the parties, citing *Tender Offers Policy*, *supra* at 1566. It also cites the Supreme Court's express rejection of a Court of Appeals decision that the Commission was required to compare the entertainment programming formats of transferor and transferee under certain circumstances in *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981). It distinguishes the ABC/ITT merger case as involving a consideration of anticompetitive consequences of a merger, rather than a comparative evaluation of the parties.

7. *Discussion:* The public interest analysis that supported the twenty-year-old decision in *Wichita - Hutchinson*, *supra*, has been significantly undermined by more recent Commission decisions, such that the case can no longer be said to be good law. It has been expressly determined by the Commission not to apply to the transfer of common carrier licenses: " . . . we note that [*Wichita - Hutchinson*] is not relevant in Common Carrier proceedings . . . ." *CNCA Acquisition Corp.*, 3 FCC Rcd 6088, 6095 n.4 (1988). In that decision, the Commission did not have occasion to address the applicability of *Wichita - Hutchinson* in the broadcast area, as the case did not involve broadcast facilities, and the Commission appropriately limited its declaration to the case presented. Several other cases, however, do indicate the Commission's position on the issue for the transfer of broadcast licenses. For example, in *Policy Statement re: Changes in the Entertainment Formats of Broadcast Stations*, 60 FCC2d 858 (1976), the Commission emphasized that a broadcaster seeking to transfer his license is not a common carrier and therefore should not be obligated to continue service even if abandonment of that service would conflict with the public convenience or necessity. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 588-89 (1981). That decision is difficult, if not impossible, to reconcile with the earlier conclusion in *Wichita - Hutchinson* that a broadcast licensee should be prevented from freely transferring his license to a qualified new licensee on the basis that continuation of the existing service would better serve the public. More recently, in its *Tender Offers Policy*, *supra*, which specifically established general policies to govern transfer cases involving hostile takeovers (as here), the Commission nowhere indicated that a target licensee's prior good service is relevant to the Commission's public interest determination. The discussion of the relevant considerations and analysis pertinent to such transfer cases clearly suggests that the policy of *Wichita - Hutchinson* is no longer followed by the Commission. In light of these facts, it is very doubtful that the Commission's decision in *Wichita - Hutchinson* remains a viable precedent for the instant case, and the decision here must be based on the precepts of the Commission's more recent cases and statements.[4]

8. The legislative history of Section 310 provides further support for this conclusion. Section 310(d) provides that no license shall be transferred unless the Commission determines that the "public interest, convenience, and necessity would be served thereby." It further provides that:

> Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the prmit or license to a person other than the proposed transferee or assignee.

47 U.S.C. §310(d). In *Wichita - Hutchinson*, *supra*, the Commission concluded that a continuation of control by the existing owner of a station is not a "transfer, assignment, or disposal" within the contemplation of Section 310(d) (then 310(b)), and, hence, that the Commission is not statutorily precluded from comparing the transferor and the proposed transferee. The Commission further determined that under the public interest standard, the Commission should not authorize a proposed transfer if it "would result in service or other conditions substantially inferior to the existing operation." *Id.* at 586. It is apparent that the statutory language focused on by the Commission there contemplates instances in which the Commission might consider the qualifications of parties other than the proposed transferee. Indeed, a primary purpose of the 1952 amendments to Section 310 (which resulted in the present version of Section 310(d)) was to ensure that the Commission could no longer use the so-called AVCO procedure, in which the Commission, prior to authorizing a transfer, required an opportunity for others to make bids for any broadcast station proposed to be sold. *See* S. Rep. No. 44, 82d Cong., 1st Sess. 8, 9 (1951). However, the 1952 amendments also added the language, not addressed by the Commission in *Wichita - Hutchinson:* "[a]ny such application shall be disposed as if the proposed transferee or assignee were making application under Section 308 for the permit of license in question . . . ." With reference to this language, the House Report observed that "in applying the test of public interest, convenience, and necessity, the Commission under this bill must do as though the proposed transferee or assignee were applying for the construction permit or station license *and as though no other person were interested in securing such permit or license.* " H.R. Rep. No. 1750, 82d Cong., 2d Sess. 7394 (1952) (emphasis added). (*See also*, *Id.* at 7397).[5] The legislative history of this part of Section 310(d) thus appears to indicate that Congress intended the Commission to determine whether the proposed transferee possesses the basic qualifications required of licensees, but that it should not indulge in comparative analyses between the transferee and others, including the existing licensee. This interpretation comports with the fundamental purpose underlying the 1952 amendments to Section 310, to avoid 'an unwise invasion by a governmental agency into private business practice . . . and undue delay in passing upon transfers of licenses." S. Rep. No. 44, *supra* at 8.

9. The impropriety of applying such an analysis to this case is further supported by significant public interest considerations. Requiring a comparison between the transferor and transferee would severely restrict and delay the transferability of licenses, would penalize licensees who have provided exemplary service and would serve to encourage licensees to diminish their level of service when anticipating sales of their facilities. Similarly, in the context of hostile takeovers, the public interest would not be served by allowing successful performance by management to be the basis for encumbering the owners' (stockholders') free disposition of a license. The ultimate result would be to encourage less than optimum service to the public, in order to ensure that the licenses may be

freely transferred. In either case, the Commission's consideration under Section 310(d) of whether grant of the application will serve the public interest, convenience, and necessity properly focuses on the transferee's qualifications, which will be discussed below. There are no overarching public interest considerations here requiring further inquiry, as in the ABC/ITT merger case. Given the Commission's experience and expertise regarding the commercial dynamics of today's cellular markets, the concerns regarding alleged competitive consequences can be resolved without more fact-gathering. *See* paragraphs 40 - 44, *infra*. *See also RKO General, Inc. v. FCC*, 670 F.2d 215, 233-34 (D.C. Cir. 1981).[6]

10. Even if *Wichita - Hutchinson* retains precedential value for transfer cases in the broadcast arena, grant of the subject transfer application is proper. The comparison LIN seeks to make is dependent entirely upon its underlying position that the debt McCaw will assume in acquiring LIN will adversely affect operation of the stations. The Commission, however, has expressly declined to consider debt or the level of debt as a relevant consideration. In *Tender Offers Policy, supra*, the Commission stated that evaluating the impact of debt load on programming services "would require us to make generic determinations as to the appropriate level of debt for a broadcast licensee which, in turn, 'would involve us in a morass of corporate financing decisions and other corporate matters.' *Turner Broadcast System, Inc.* [citation omitted]. In general, we believe it unnecessary and inappropriate for us to become involved in reviewing such corporate financing decisions, particularly in light of the regulatory oversight of other governmental entities with greater expertise in financing matters." *Id.* at 1566 n.139. At the same time, the Commission also rejected one party's contention that the Commission should require in hostile takeover cases "a specific and clear showing of some benefit service beyond that [provided by] incumbent, whether in the programming area (e.g., children's TV) [or others], before a transfer of control involving a hostile takeover is approved." *Id.* That contention, rejected by the Commission, is essentially the same as LIN's here. This position was reiterated in the next hostile takeover case. *See Macfadden Acquisition Corp.*, 104 FCC2d 545, 568 (1986). This position was even more recently reiterated, in more general terms, in *In re Amendment of Section 73. 3597*, 4 FCC Rcd 1710, 1711 (1989). Accordingly, even if a comparison between LIN and McCaw could be required if facts indicating that the public interest would be better served by LIN than by McCaw were raised, LIN has not supplied a basis here for such a comparison.

FINANCIAL QUALIFICATIONS

11. *McCaw's Proposal:* McCaw originally estimated it would need from $6 to $6.5 billion to consummate the tender offer; subsequently this figure was reduced to $5.5 billion, when McCaw reduced its per share offer.[7] To finance the tender offer, McCaw is relying on $1 billion cash from the recent sale of stock to British Telecom USA Holdings, Inc. ("British Telecom").[8] McCaw is also relying on an existing and a new credit facility to be established by a syndicate of banks headed by Morgan Guaranty Trust Company ("Morgan Guaranty," a New York state chartered banking institution), and submits two supportive letters dated June 12 and July 5, 1989 from this entity. In addition, McCaw originally asserted it would rely on money to be obtained from public or private offerings to be managed by Morgan Stanley & Co., Inc. ("Morgan Stanley") and submitted a letter from this entity. Subsequently, McCaw submitted a letter from Drexel Burnham Lambert Inc. ("Drexel Burnham") stating that it can arrange $2.5 billion of financing for McCaw by the public or private placement of debt or equity.

12. *LIN's Contentions:* According to LIN, McCaw has not established with "reasonable assurance" that it has the funds necessary to consummate the proposed tender offer or to operate the cellular and broadcast systems involved in the acquisition. LIN argues that the availability of acquisition funds is highly suspect. In addition, LIN maintains, McCaw's already high debt-to-equity ratio and the additional debt it will incur to acquire LIN will seriously weaken McCaw's financial condition, to the point that it will not be a viable provider of cellular or broadcast services. According to LIN, further inquiry should be made to determine McCaw's plans for operating or transferring the LIN broadcast properties and whether any changes in operations made by McCaw after the acquisition would serve the public interest. LIN concludes that McCaw's applications should be designated for hearing to determine whether the public interest requires denial of the applications.

13. LIN contends that the Morgan Guaranty letters fail to make a commitment to lend.[9] In effect, LIN maintains that the July 5 letter makes clear that one month after the commencement of the tender offer, the restrictive covenants in the existing credit facility (regarding expansion of the debt) have not been waived and the lending syndicate still has not been organized. These letters, LIN argues, do not provide (i) the amounts of the new facilities that the participating banks will fund; (ii) the identity of any participating banks other than the agents; or (iii) any expression of "confidence" that the proposed syndicate could be established. LIN maintains that the Commission has never concluded that an applicant has a reasonable assurance of obtaining financing based on syndicated loans unless all of these elements have been met. Moreover, the restrictive covenants in McCaw's current credit agreement prohibit McCaw from exceeding $2.5 billion in total debt. LIN questions whether McCaw's existing lenders will condone its reaching a 240% increase in indebtedness ($6.5 billion) for an increase of only 36% in underlying cellular assets. (The amount and percentage of projected indebtedness are reduced somewhat by the reduction in offer price, but LIN's contention remains the same in principle.) According to LIN, even if McCaw were to commit to liquidate LIN's television broadcast and publishing assets (an act not currently contemplated, according to McCaw's announced plans) to generate pretax funds to reduce indebtedness, the resulting level of debt would still represent a monumental increase in McCaw's total indebtedness. LIN further argues that the Commission should require McCaw to demonstrate whether existing lenders are disposed to modify the existing loan agreements.

14. LIN additionally argues that the Drexel Burnham letter, which states that Drexel Burnham is highly confident it can arrange $2.5 billion of financing for McCaw, provides an insufficient basis demonstrating that McCaw can obtain the needed financing. According to LIN, Drexel Burnham is not even prepared to consider and

discuss providing funds for the trustee until after an STA is granted, and does not even state that there is a reasonable expectation that such arrangements can be made.[10]

15. LIN also asserts that McCaw has not demonstrated how revenues from the "self-sustaining" cellular and broadcast operations will support the increased annual interest payments McCaw's new borrowing will require. According to LIN, the financial strain placed by this increase in debt on the operation of LIN's television and cellular properties following the acquisition could reduce McCaw's ability to be a viable provider of service and an effective competitor.[11] Therefore, LIN argues, the Commission should determine whether the proposed transfer would result in the provision of inferior service to the public, pursuant to *Wichita - Hutchinson, supra*, especially in the case of a hostile takeover where the transferor has not decided to relinquish voluntarily its role as a public trustee.[12] LIN argues that given McCaw's projected losses,[13] serious questions remain with respect to McCaw's ability to find future financing sufficient to avoid service cutbacks and insolvency.[14] According to Lin, it is clear that McCaw does not have the the financial capacity to fulfill LIN's strong commitment to public service programming for its TV stations and for system expansion and service improvement in its cellular systems.[15]

16. *Houston Agents' Contentions:* The Houston Agents also allege, among other things, that McCaw is not financially qualified. According to the Agents, McCaw has failed to comply with the requirements of Section 22.917(d) of the Rules by failing to provide (1) information concerning the acquisition price and estimated operating expenses for one year; (2) a balance sheet current to within 90 days; (3) a current income statement; and (4) a statement of projected revenues and expenses. The Agents contend that without this information the applications must be returned as defective.

17. *McCaws Response:* McCaw states that it has demonstrated that it has reasonable assurance that funds will be available to purchase and operate LIN's cellular and broadcast facilities. First, McCaw asserts that the June 12, 1989 letter from Morgan Guaranty specifically states that the terms of the existing credit facility will be amended to ensure that the funds are available for the proposed acquisition. Thus, McCaw argues the Morgan Guaranty letter is comparable to a letter found acceptable in a previous hostile takeover case, *Macfadden I, supra*, at 568 n. 17, in which an investment advisor stated that there was a reasonable expectation that an existing loan could be refinanced. McCaw also maintains that even though Morgan Guaranty states that the letter is not a legally binding document, Morgan Guaranty has provided a reasonable assurance of a present firm intention to make a loan, citing *Merrimack Valley Broadcasting Inc.*, 82 FCC2d 166, 167 (1980). Moreover, McCaw submits an additional letter from Morgan Guaranty with its response to LIN's petition to deny the STA. According to McCaw, the July 5 letter indicates that, based on Morgan Guaranty's understanding of negotiations involving the other agent banks participating in McCaw's existing credit facility, McCaw has been provided with reasonable assurances that the facility will be renegotiated to ensure that the existing funds are available for the LIN acquisition. McCaw states that this supplemental letter also provides assurances that Morgan Guaranty and the other agent banks will use their best efforts to assemble the syndicate and organize the financing for McCaw's additional $2 billion facility. McCaw asserts that the original and supplemental Morgan Guaranty letters meet the basic requirements for demonstrating its financial qualifications under the Commission's rules.

18. Second, McCaw's July 5 letter from Drexel Burnham states that Drexel Burnham is "highly confident" that based upon today's capital markets it can arrange $2.5 billion of financing for McCaw either through private or public placement of debt or equity to finance McCaw's acquisition of LIN. According to McCaw, this letter complies with the Commission's standards for such letters, and provides reasonable assurance of the availability of the funds.

19. Third, McCaw argues that the Commission should not become enmeshed in evaluating the amount of debt which is appropriate for the post-merger corporation in the context of a corporate acquisition. On the basis of its current financial strength, McCaw has been able to obtain reasonable assurances that it will be able to obtain $6.5 billion, well in excess of the amount needed to consummate the proposed acquisition of LIN. Expert and highly experienced independent financial institutions have had a full opportunity to determine whether McCaw is creditworthy and have concluded that it is, McCaw maintains. Therefore, the Commission need not intervene and "second guess" a decision that has already been made by financial institutions. Takeovers often require the offeror to incur substantial debt, according to McCaw. McCaw argues that if the Commission were to decide to preclude purchasers from taking on such debt, the agency in effect would be helping to protect incumbent management from takeovers, in direct contravention of its stated policy of remaining neutral in tender offer situations. In addition, McCaw maintains that the McCaw prospectus outlining the terms of the tender offer, which LIN relies upon to contend that McCaw will not be financially viable, presents a "risk factor" analysis which is designed to describe a range of possibilities for potential investors and is not necessarily a prediction as to likely outcomes. Thus, McCaw contends that LIN's reliance on this prospectus to prove McCaw's "true" assessment is inappropriate.[16]

20. Fourth, McCaw states that, based on market capitalization, McCaw is the largest company in the world with cellular as its primary business. In addition, McCaw maintains that with debt accounting for only 22% of its current capitalization, McCaw has a smaller debt-to-equity ratio than exchange telephone companies, which have an average percentage debt of approximately 30%. At present, McCaw indicates it has market capitalization of nearly $9 billion, and ranks among the 100 largest publicly held companies in the United States. McCaw also asserts that it has a proven, documented record of rapidly building and efficiently operating its systems and that it has no intention of wavering from this commitment to provide high quality service after it purchases LIN. McCaw argues that it will have the resources and the experience to integrate LIN's cellular systems with its own, to operate LIN's broadcast facilities and to provide superior service to the public. According to McCaw, the acquisition of LIN will enhance McCaw's competitive position in the telecommunications marketplace and facilitate innovations and improved service to the public.[17] McCaw's business plan for cellular systems has focused on the establishment of regional operations. Regional systems provide operational efficiencies by consolidating a range of company activities. LIN's cellular systems will com-

plement and enhance McCaw's. With regard to LIN's broadcast facilities, McCaw represents it intends to continue the programming policies and practices currently employed by LIN, drawing on the experience of those McCaw principals with broadcast experience.

21. Finally, to the extent the Houston Agents assert that required information has not been supplied, McCaw argues that the information is either not required or in fact has been supplied. These assertions do not warrant designation for hearing or dismissal of the applications, McCaw asserts. In addition, McCaw argues, the Commission has not required the filing of a balance sheet, and the related income, revenue, and expense statements in previous transfers where the same type of financing as proposed in this case was approved.

22. *Discussion:* In order to acquire cellular or television companies, an applicant must demonstrate that it has a reasonable assurance that the necessary funds will be available. *See Multi - State Communications, Inc. v. FCC*, 590 F.2d 1117, 1119 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 959 (1979). The basic reasonable assurance standard is the same for both broadcasting and cellular common carriers, although the precise filing rules are different.[18] McCaw currently estimates it would need $5.5 billion to finance the tender offer. It has stated its reliance on $1.0 billion in cash from the sale of stock to British Telecom, $1.0 billion from an existing $1.3 billion revolving credit facility, $2 billion from a new credit facility to be established by a syndicate of banks headed by Morgan Guaranty, and up to $2.5 billion from public or private equity or debt placements to be managed by Drexel Burnham. For the reasons explained below, these sources of funds can be relied upon, and the total funds available will be well in excess of the amount needed to acquire LIN, with the balance more than adequate to operate the television stations for three months.

23. First, the sale of stock to British Telecom has already occurred. McCaw has asserted that the proceeds from this sale have been set aside for the acquisition of LIN (*see* Form 430 of June 23, 1989). There is no argument or indication to the contrary based on the pleadings or the balance sheet that McCaw submitted to the SEC and which was made part of its filings for the applications before this Commission.[19]

24. Second, the language in the Morgan Guaranty letters constitutes a reasonable assurance of a present firm intention to make a loan. The June 12, 1989 letter states that Morgan Guaranty intends to participate as the lead bank in a syndicate of banks which would lend McCaw up to $2 billion for funding the acquisition of LIN. The letter goes on to state that Morgan Guaranty is familiar with McCaw's performance record and corporate plans; that it currently acts as an agent bank for McCaw's $1.3 billion syndicated credit facility; and that it believes the existing loan facility will be amended to make this line of credit available for the acquisition.[20] The July 5, 1989 letter clarifies the June 12, 1989 Morgan Guaranty letter by stating that the agent banks in McCaw's existing credit facility have participated in extensive and substantive discussions regarding the new and amended credit facilities. The July 5 letter lists the agent banks and states that Morgan Guaranty, together with the other agents, will use its best efforts to assemble the syndicate and organize the financing. We find that the Morgan Guaranty letters constitute reasonable assurance that $3.0 billion in credit will be available to McCaw to finance its acquisition of LIN. *See Advanced Mobile Phone Service Inc.* (Chicago), 91 FCC 2d 512, 516-17 (1982). Under the circumstances of this case, where the facilities being acquired are fully operational,[21] there is an existing credit facility and there are clear indications that the same agent banks intend to amend the existing facility and provide additional money, additional information concerning the syndicated banks will not be required. *See Macfadden I*, *supra* at 568 (letter provides reasonable assurance where bank offers its "best efforts" to obtain remaining funds from other banks to finance tender offer).

25. Third, the Drexel Burnham letter also provides a reasonable assurance that the $2.5 billion in financing attributed to it will be available. Drexel Burnham states that it is "highly confident" that, based upon current market conditions, it can arrange $2.5 billion of financing for McCaw either privately or publicly in today's capital markets to finance the LIN acquisition. This letter states that this conclusion is based upon Drexel Burnham's experience in underwriting and privately placing corporate debt, equity and equity-related securities, its knowledge of McCaw and the opportunities presented to McCaw by this acquisition, and the success McCaw has had in becoming one of the major cellular telecommunications companies of the 1980's. We have previously found that expressions of opinions by experts in the financial community can be used to establish that an applicant's proposed funding is an acceptable method of demonstrating its financial qualifications. *See Macfadden I*, *supra* at 567; *Advanced Mobile Phone Service, Inc.* (Chicago), *supra* at 517.

26. Fourth, LIN's contention that post-acquisition McCaw will be so heavily laden with debt that it will not be able to provide high quality cellular services or television programming is highly speculative, and does not warrant denial of McCaw's application.[22] Although McCaw's debt-to-equity ratio will probably increase once it acquires LIN, based on McCaw's prior operational history and its statements before this Commission, McCaw can be expected to undertake all necessary steps to continue to provide high quality service to the public and remain a viable competitor. The Commission has previously determined not to interfere with a company's capital structure or second guess financial institutions or investors which believe that the surviving company will be financially strong enough to repay the loans. *See generally Tender Offers Policy*, *supra* at 1568, n.144 (1986) (in making public interest determinations, the Commission need not become enmeshed in evaluating the amount of debt financing which is appropriate in the context of a corporate acquisition). *See also Macfadden I*, *supra* at 567. Moreover, since LIN's speculations are based on the hypothetical actions McCaw might take in managing the post-acquisition business, a hearing is unlikely to produce any facts which would aid our evaluation, even if this issue were entertained. In addition, the fact that McCaw will suffer a net operating loss for some years to come is not unusual for a cellular service company which is only in a start-up phase of operations.

27. Finally, the Houston Agents' allegations regarding McCaw's satisfaction of Section 22.917(d) are rejected. That section states: "Each application for an assignment of a license (or permit), or for the transfer of control of a corporation holding a license (or permit), shall demonstrate the financial ability of the proposed assignee or transferee to acquire and operate the facilities by submit-

ting adequate financial information under the guidelines specified in this section as appropriate." 47 C.F.R §22.917(d). Under the guidelines of Section 22.917, the requirement that the applicant demonstrate the financial ability to operate the station for one year refers to unbuilt facilities and not operational facilities. *See CNCA Acquisition Corp.*, 3 FCC Rcd 6088 at n. 8 (1988).[23] LIN's five cellular systems are all operational. In addition, while McCaw argues that the Commission has not required a balance sheet for cellular transfer cases involving similar financing arrangements, a current balance sheet submitted to the Commission by McCaw has been reviewed.[24] Finally, additional information such as income, revenue and expense statements, is required only when the financial showing submitted is otherwise insufficient. *See* Section 22.917(a)(3)(ii).

28. Therefore, there is no basis upon which to dismiss McCaw's application. Moreover, even assuming that LIN and Houston Agents have alleged a *prima facie* case for denial of the application, they have not raised a substantial and material question of fact concerning McCaw's financial qualifications which would warrant a hearing. *See Astroline Communications Company*, 857 F.2d 1556 (D.C. Cir. 1988). Based on the foregoing analysis of the Commission's requirements and McCaw's submissions, McCaw has provided a reasonable assurance that it is financially qualified to effectuate the proposed acquisition of LIN.

ALIEN INFLUENCE

29. *LIN's Contentions:* Because of British Telecom's ownership interest in McCaw, LIN maintains that the proposed takeover requires an evidentiary hearing and an explicit finding under Section 310(b)(4) of the Communications Act that British Telecom's influence over LIN's properties would be consistent with the public interest concerns underlying the alien ownership limitations of the Act. LIN argues that this case requires a determination as to whether it serves the public interest to transfer the LIN television and cellular operations located in some of the country's largest markets to an entity in which a foreign government has such a substantial interest and can exercise significant influence.[25] This case requires a factual investigation, LIN maintains, because this non-U.S.-based company, nominally controlled by a foreign government, owns just under 25% of the applicant's stock and also has (i) substantial control rights, (ii) positive or negative control over filling 37% of the applicant's board, and (iii) a record of past and future participation in key management decisions. According to LIN, this inquiry should include, in light of British Telecom's apparent knowledge of the proposed hostile takeover at the time it entered into the McCaw deal, the role of British Telecom in the planning, decision-making and implementation of the tender offer for LIN.

30. LIN argues that the previous Common Carrier Bureau approval of the acquisition of McCaw stock by British Telecom[26] is irrelevant here for the following reasons. According to LIN, the Bureau's holding was premised on McCaw using the money generated by British Telecom to strengthen the financial position of McCaw. However, McCaw has now earmarked this money for its acquisition of LIN, which will result in McCaw becoming even more financially fragile, with debt service exceeding $750 million per annum. Furthermore, LIN asserts that British Telecom and McCaw did not disclose to the Common Carrier Bureau that the proposed acquisition of LIN would be made using British Telecom's money and, thus, the Bureau did not specifically consider the issue of whether alien-funded takeovers of American communications licensees are consistent with the public interest. In addition, LIN argues that the omission from McCaw's pleadings of these decisionally significant facts undercuts any precedential force that the earlier decision would otherwise have.

31. *McCaw's Response:* McCaw asserts that British Telecom's presence as a minority, noncontrolling investor in McCaw does not involve any questions relevant to the tender offer that were not previously considered and rejected by the Common Carrier Bureau, which concluded that the investment by British Telecom in McCaw was not in violation of Section 310 of the Act. The British Telecom investment in McCaw was the subject of full public notice and comment proceedings earlier this year, McCaw asserts, and in this context, LIN submitted filings asking for an inquiry into the very same matters which form the basis of its current request.[27] According to McCaw, LIN's arguments concerning the lack of a rational basis for the Common Carrier Bureau's previous conclusions in light of the acquisition of LIN by McCaw must be rejected for several reasons. First, McCaw represents that the Common Carrier Bureau did not rely upon the benefits of the British Telecom investment in reaching its fundamental legal determination under Section 310(b)(4) of the Act. Second, McCaw argues that the British Telecom investment unquestionably has strengthened McCaw and will "support deployment, enhancement and expansion of cellular services to the public."[28]

32. *Discussion:* In *McCaw Cellular*, *supra*, the Common Carrier Bureau found that the acquisition of approximately 22% of the McCaw stock by British Telecom was consistent with Section 310(b)(4) of the Communications Act.[29] The Common Carrier Bureau observed that under Section 310(b)(4) of the Act foreign companies are permitted to hold indirectly a less than 25% ownership interest in a Commission licensee. Moreover, the Common Carrier Bureau stated that this section does not proscribe aliens from becoming directors as long as at least 75% of the directors in the company which indirectly controls the licensee are United States citizens. Additionally, the Common Carrier Bureau concluded that the British government's ownership interest in British Telecom did not alter the analysis under Section 310(b)(4) of the Act. Under this section a foreign government can acquire interests up to the limits established therein. *See McCaw Cellular*, *supra* at 3790.

33. The Common Carrier Bureau also found that British Telecom would not be exercising control of McCaw within the meaning of Section 310(d) of the Act. British Telecom would only be acquiring some 22% of the equity and voting power in McCaw. British Telecom would elect four directors out of 19, or 21% of the board of directors. Craig McCaw would retain majority control, in terms of electing a majority of the board of directors (10 out of 19 or 53%) and holding 71.17% of the voting power. The Bureau also found that Craig McCaw would continue to exercise control and that British Telecom denied any intention to control the officers of McCaw.[30] After considering certain covenants in the purchase agreement which related to transactions that required prior consent from

British Telecom, the Common Carrier Bureau found that those covenants did not constitute control, but rather were designed primarily to protect British Telecom's equity interest in McCaw. *Id.* at 3789-90.

34. The factual and legal arguments raised here by LIN with respect to the alien influence issue were fully, fairly, and correctly decided by the Common Carrier Bureau in *McCaw Cellular, supra*. The analysis is the same with respect to the broadcast stations to be acquired by McCaw. LIN did not seek reconsideration or review of the Bureau's decision in that case. LIN's renewed attack on the McCaw/British Telecom transaction is therefore collateral and need not be entertained here. Nonetheless, we note that LIN essentially addresses in this case the uses that would be made of the infusion of capital by British Telecom, and attempts to require an evaluation in this proceeding of whether it is consistent with the public interest for the Commission to sanction foreign funded takeovers of domestic companies. Based on a review of this case, including facts that can be officially noticed or are supported by affidavit, LIN has not established a *prima facie* case which would warrant a conclusion under existing Commission policy that the public interest would be harmed by the particular transaction contemplated by McCaw.

COMPETITION

35. *LIN's Contentions:* If McCaw acquires LIN, it would become a general partner in Los Angeles and Houston (35% of the equity and 50% of the voting power in Los Angeles, 56% of the equity and 50% of the voting power in Houston) with BellSouth, with which McCaw currently competes in other markets. According to LIN, the Justice Department has recognized that the direct exchange of contemporaneous market information between horizontal competitors can be anticompetitive. Thus, LIN argues that given these facts the Commission must determine whether an evidentiary hearing is appropriate. LIN states that the Commission should consider the competitive environment and any adverse consequences to consumers' interests. LIN argues that the Commission has a mandate to consider anticompetitive issues and it simply cannot dismiss competitive issues as irrelevant or meaningless. Additionally, LIN alleges, the Commission should explore the impact on LIN of the covenants not to compete in the British market which McCaw has entered into with British Telecom. Extending the covenant not to compete to LIN would disserve the public interest. LIN maintains that it is a potential entrant in the British and European markets, yet the effect of the hostile takeover would be to preclude LIN from competing in United Kingdom (and probably European) ventures. Accordingly, LIN requests that the following issues be designated for hearing: whether the potential for LIN to become involved in European communications businesses would be frustrated by the hostile takeover and what weight should be given to the inhibiting effects of the noncompetition agreement as extended to LIN.

36. *BellSouth's Comments:* BellSouth filed "comments" requesting that McCaw address the competitive issues which arise when a partner in one market is an unaffiliated competitor in another market before the Commission determines whether the acquisition of LIN is in the public interest. According to BellSouth, post-acquisition McCaw would become BellSouth's active partner in Los Angeles and Houston. Thus, BellSouth argues, McCaw would have an incentive to postpone the introduction of new marketing, technological and other approaches in Los Angeles and Houston until such approaches had been introduced in the Southeastern markets where McCaw competes with BellSouth (a total of 13 markets). Likewise, if BellSouth were to introduce such innovations in Los Angeles or Houston, it would in effect be disclosing such otherwise proprietary information to McCaw and would lose a potential competitive advantage in the Southeast markets. Thus, both parties would be faced with difficult business decisions in dealing with the day-to-day conflicts which would arise in the operation of the Los Angeles and Houston systems.

37. *Houston Agents:* The Houston Agents request that the applications be subject to an evidentiary hearing to determine whether Houston Cellular's conduct violates the antitrust laws. According to the agents, Houston Cellular: (1) sells cellular service at the wholesale and retail levels in an unlawful and anticompetitive manner; (2) unlawfully prohibits the resale of cellular service; (3) unlawfully discriminates in providing cellular service to affiliates; and (4) unlawfully bundles cellular equipment and service.

38. *McCaw's Response:* McCaw contends that LIN's and BellSouth's arguments are without merit. McCaw states that the Commission has previously considered and rejected the imposition of conditions to prevent exchanges of information between partners who are competitors in another market. McCaw maintains that the very types of concerns LIN and BellSouth now cite as requiring investigation have been previously held not to raise public interest questions requiring Commission intervention. Finally, McCaw states that the Department of Justice has reviewed the proposed McCaw acquisition of LIN during the Hart-Scott-Rodino waiting period, which expired on June 24, 1989, without taking any action. Accordingly, McCaw concludes that there is no basis for Commission investigation of this issue. In addition, McCaw asserts that the noncompetition provision in the British market was deleted from the Purchase Agreement prior to the closing of British Telecom's investment in McCaw.

39. McCaw argues that the Houston Agents' contentions constitute simply a restatement of pending complaints against Houston Cellular concerning a contractual dispute between the Houston Agents and Houston Cellular regarding resale and CPE (consumer premises equipment) marketing practices. Therefore, McCaw argues that the Houston Agents' claims are not properly raised on review of the transfer applications, but have been properly raised as a formal complaint under section 208 of the Act. McCaw states that it has not been involved in any of the activities complained of. Finally, McCaw alleges that upon approval of the transfer of control, McCaw would fully and completely comply with all relevant Commission rules and policies concerning cellular resale and CPE practices.

40. *Discussion:* The British Telecom/McCaw purchase agreement does not now contain the noncompetition provision in the British market that LIN contests. Therefore, LIN's request to designate related issues for hearing is now moot.[31]

41. With respect to LIN's and BellSouth's concerns that McCaw will be both a competitor and partner, no condition need be placed on the grant of the transfer of control. In granting transfer of control applications for

Pacific Telesis (Pacific) to acquire control of Communications Industries, Inc. (Communications, Inc.), the Commission originally imposed a condition limiting the exchange of information between partners/competitors.[32] However, on reconsideration the Commission eliminated this condition. The Commission concluded that it did not

> make[] any practical sense to place a Dallas-like condition on the majority owner, because to do so would magnify management problems by insulating the majority owner from active participation in the business . . . . Additionally, we do not believe we are bound to impose Dallas-like conditions on Pacific wherever it is engaged in a partnership-competitor overlap. The condition in Dallas was imposed as part of a consent decree. DOJ proposed the condition in that case, and it was accepted by Pacific. Thus, the matter was never adjudicated by the court. Under these circumstances, having balanced our concerns of maintaining competition against the problems that would be engendered by imposition of the condition in this case, we believe that the imposition of the condition on Pacific is inappropriate.

James F. Rill, 61 RR2d 1129, 1131 (1986).

42. The Commission concluded that as a general proposition it should not impose Dallas-like conditions as a matter of course. It found that, in response to its invitations to settle cellular comparative hearings with merger agreements, the industry had evolved to include numerous partnerships in which partners in one market are competitors in another market. It believed that imposing conditions in all such situations could very well stifle innovation in this emerging field. Moreover, there were no indications of collusion between partners to the detriment of the public in markets where those partners were also competitors. Thus, on further consideration, the Commission chose as the more appropriate course not to restrict the actions of partners merely because the partners were also competitors in another market. *Id.*

43. In accordance with this precedent, we will not deny these transfer applications or impose conditions on the exchange of information between BellSouth and McCaw. The cellular industry continues to have numerous partnerships where partners in one market are competitors in another market. Moreover, the cellular industry is still an emerging telecommunications technology. The imposition of conditions could stifle investment and innovation and thus adversely affect the development of this industry, which a decade of Commission policies have sought to promote. To date we have had no indication of illicit collusion between partners to the detriment of the public in markets where those partners are also competitors. Moreover, there is no indication of anticompetitive practices by partners to the detriment of the public in markets served by the partnership. Given the competition that a partnership faces within its own market, BellSouth's allegations that partners might "hold back" new marketing, technological or other approaches is speculative at best. Neither LIN nor BellSouth has presented any facts to establish that the resulting partnerships between McCaw and BellSouth would be *prima facie* inconsistent with current Commission policy.

44. The Houston Agents' allegations have also been raised in a formal complaint currently pending before the Commission, which is the proper mechanism for addressing those concerns. Moreover, the complaints are not against the transferee, McCaw, but rather are against the policies of Houston Cellular, of which LIN is a partial owner and which is thus subject to McCaw's tender offer. The Houston Agents are not questioning the qualifications of McCaw, the transferee. Therefore, we find that the Houston Agents have failed to establish a *prima facie* case warranting inquiry into whether McCaw is qualified to assume control of Houston Cellular. If any of the Houston Agents' allegations are borne out by the facts adduced in conjunction with the Commission's consideration of their complaint, appropriate remedies can be pursued at that time. Our unwillingness to resolve all of those allegations in the context of this limited proceeding, in short, should not and does not pre-judge the outcome of that broader complaint proceeding.

TELEVISION/CABLE CROSS - INTEREST

45. *LIN's Contentions:* LIN contends that the presence of John Malone on McCaw's board of directors currently violates the Cable Act[33] and the Commission's rules. As McCaw currently owns an attributable interest in LIN (*i.e.*, more than 5% of LIN's stock), and Malone is an officer of McCaw, Malone has an attributable interest in LIN's television stations, argues LIN. Malone is also the president of Tele-Communications, Inc. ("TCI") a company with cable franchises which have an aggregate of 120,000 subscribers within the Grade B contours of LIN television stations. LIN maintains that these interests of Malone violate the Cable Act and the Commission's rules, which prohibit any one party from having an attributable interest in a cable system whose service area overlaps with the Grade B contour of a television station in which the same party also has an attributable interest. (47 U.S.C. §533; 47 C.F.R. §76.501.) LIN attributes the violation to McCaw, and continues that the situation would be exacerbated if McCaw were to acquire control of LIN, thereby increasing Malone's influence over the television stations. LIN contends that to escape attribution of McCaw's interests, Malone must establish that McCaw is a multi-faceted company and that Malone's duties and responsibilities are "wholly unrelated to the broadcast licensee," and he must sign an effective recusal statement and observe its provisions.[34] LIN contends that Malone has met none of these requirements and that, to the contrary, Malone did participate in McCaw's decision to initiate the tender offer for LIN, as well as other decisions and activities ancillary to the tender offer. LIN submits that a hearing is necessary to determine the impact of any violation of the Commission's rules or the Cable Act on McCaw's qualifications to acquire control of LIN.[35]

46. *Discussion:* McCaw's disclosure of relevant ownership interests in an ownership form provided to LIN for submission to the Commission[36] essentially complied with Commission rules.[37] As provided by the rules,[38] it included a statement regarding Malone's interest in TCI and his position on and activities as a member of McCaw's board, together with an explanation of why Malone should not be considered to have an interest in the LIN television stations cognizable for purposes of the multiple ownership and cross interest rules. In abjuring any interest or dominion by Malone over the television stations,

McCaw stated that Malone is an outside director, separated from the stations by several intervening corporate layers in which he holds no position, and that his duties as a McCaw director do not relate to the activities of any of the LIN broadcast subsidiaries. McCaw, however, does not state what Malone's duties and responsibilities are, as called for in the instructions to the Ownership Report (Instruction 5). Nonetheless, in light of the disclosure of Malone's position in the Ownership Report,[39] it was not unreasonable for McCaw to assume that its determination that Malone's interest in LIN's television stations is not cognizable was correct. Accordingly, LIN's objections here do not raise a question as to McCaw's qualifications to hold the subject licenses. Prior to consummation, McCaw will be required to submit a more complete explanation of Malone's responsibilities and duties as a McCaw director to explain his insulation from the television stations, now and after any acquisition. If this explanation does not demonstrate that Malone is fully insulated, any necessary action can be taken, including submission of a specific recusal statement.[40] In the interim, Malone's stated intention, in conjunction with the following condition, will suffice. In order to fully comply with the cross-interest rules and statute, Malone must specifically refrain from any involvement in McCaw activities directed toward the acquisition of LIN, friendly or hostile. It was not unreasonable for McCaw to conclude that because the nature of the hostile takeover prevents him from exerting any present influence on LIN's stations, it was permissible for Malone to participate in the takeover strategies and activities. Nevertheless, the nature and terms of the ultimate acquisition, and perhaps the contest itself, could have a direct impact on the television stations, and Malone should thus refrain from any further involvement.

CHARACTER QUALIFICATIONS

47. *LIN's Contentions:* LIN asserts that because Malone is a director of McCaw, the Commission must determine his role, if any, in the conduct of TCI in the cable franchise renewal proceeding in Jefferson City, Missouri which resulted in a multi-million dollar jury verdict against TCI for antitrust violations and tortious interference with business.[41]

48. The extent of Malone's knowledge or involvement in the activities of TCI in its franchise renewal proceeding in Jefferson City has yet to be determined. As noted by LIN in its supplement to its petition to deny, that question is currently under review by the Mass Media Bureau in conjunction with another application by a TCI subsidiary.[42] In view of the uncertainty regarding the connection between Malone and any of the licensed facilities, as well as the limitation of his interest in McCaw (as one out of nineteen directors), no further action is warranted at this time. If it is determined that Malone did participate in or know of the activities in the Jefferson City franchise renewal proceeding, the Commission can take any appropriate action with respect to any of the broadcast or common carrier licenses at such time.

CANDOR

49. *LIN's Contentions:* LIN contends that McCaw has exhibited a serious lack of candor in its representations to the Commission. In addition to those allegedly misleading representations already discussed above in conjunction with other issues, LIN cites the following additional instances: failure to disclose to the Commission that a major purpose of the British Telecom transaction was to finance a hostile tender offer for LIN; insistence on the need for expedited treatment via the STA process when it allegedly knew that it could not secure the necessary financing and regulatory approvals to complete the transaction for several months; failure to amend its application to show that the network affiliation agreements for the six stations that have them would be jeopardized if McCaw acquires control of the stations; failure to disclose future plans for LIN's television and cellular operations; "innuendo" that McCaw's proposed trustee for the related STA transaction (see paragraph 2, above), Senator Eugene McCarthy, had his qualifications approved as a director of Harcourt, Brace, Jovanovich, when that company acquired certain television stations. With regard to several of these allegations, LIN asserts that even the filing of a technically accurate pleading can warrant the addition of issues or disqualification,[43] and that it is not exculpatory, and is perhaps incriminating, that McCaw disclosed certain of the pertinent facts in filings with other government agencies.[44]

50. *Discussion:* Even assuming a *prima facie* case has been presented, the issues raised here by LIN do not raise a substantial and material question as to McCaw's candor with the Commission, either individually or collectively. There is no basis upon which to question McCaw's assertion that it had not decided to purchase LIN at the time it entered into the British Telecom agreement. Moreover, the agreement filed by McCaw and British Telecom with the Commission on January 26, 1989, included provisions clearly indicating the possibility that McCaw might acquire interests in other top-10 cellular markets. McCaw's endeavor to use the STA process was not inappropriate in the hostile takeover situation it faced, and the Commission was advised of relevant material facts regarding financing of the acquisition and the question of possible involvement by the New York State Public Service Commission and the California Public Utilities Commission. McCaw's opinion regarding the significance and consequence of those issues and its action on that opinion, *i.e.*, seeking to use the expedited STA procedure, do not constitute material misrepresentation. The provision for nontransferability of the network affiliation agreements of the LIN television stations is standard in such agreements, and does not warrant particular notice. It is simply not relevant to the transfer application. The possibility of a change in the specific content of the entertainment programming provided by any of the stations is only that, and if it occurs it does not contradict McCaw's stated intention to continue in effect the programming practices and policies of LIN. McCaw's intentions regarding disposition of the LIN facilities need not be disclosed to any greater extent than is already revealed in the application and pleadings. LIN's contention that this information is necessary is based on its position that a comparison between LIN and McCaw is necessary, and that position is rejected in paragraphs 7 - 10, *supra*. McCaw's July 6, 1989, amendment, regarding the other broadcast interests of its trustee, Eugene McCarthy, accurately states that McCarthy is a director of Harcourt, Brace, Jovanovich, which owned a station; it does not attempt to claim that McCarthy's qualifications were ever reviewed by the Commission because of that position.[45]

51. Accordingly, grant of the above captioned applications for the transfer of control of LIN Broadcasting Corporation to MMM Holdings, Inc. will serve the public interest, convenience, and necessity and, therefore, the applications ARE GRANTED,[46] and the petitions to deny those applications filed by LIN Broadcasting Corporation and the Houston Agents, and the Comments filed by BellSouth Corporation ARE DENIED.

52. This action is conditioned on the submission by McCaw to the Chief, Mass Media Bureau, of a description of John Malone's position and duties as a director of McCaw and a statement that John Malone will comply with the restrictions on his activities as a board member of McCaw, as specified in paragraph 46, *supra*, or will be removed from the McCaw board of directors.

53. This action will not take effect until September 5, 1989, at 4:30 a.m.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau
Roderick K. Porter
Acting Chief, Mass Media Bureau

FOOTNOTES

[1] The Commission formalized this procedure to grant a special temporary authorization to a trustee, pending consideration of a "long-form" application, for hostile takeover cases in *Tender Offers and Proxy Contests* (" *Tender Offers Policy* "), 59 RR2d 1536 (1986), *appeal dismissed sub nom. Office of Communication of the United Church of Christ v. FCC*, 826 F.2d 101 (D.C. Cir. 1987).

[2] Cellular Marketing, Inc., Lawrence Communications, Inc., Mobius Electronics, and W. Roy Bronson are independent agents and/or resellers of Houston Cellular Telephone Company ("Houston Cellular"), one of the LIN subsidiaries which is an object of the subject transaction. These parties oppose only the transfer of the licenses for the Houston facilities held by Houston Cellular.

[3] Facts and arguments raised in the pleadings regarding the STA request, as well as information in the STA application, are considered to the extent relevant to or useful in the instant determination.

[4] LIN has revealed no Commission case, and none appears to exist, in which *Wichita - Hutchinson*, *supra*, has been cited with favor. It is true that in connection with the *Overmyer* case, cited by LIN, Congress did criticize the Commission for neglecting to hold hearings regarding several aspects of an uncontested transfer of control. That case, however, and Congress' subsequent inquiry and report, involved "trafficking" in licenses, possible violations of the out-of-pocket expenses rule, the Interim 50 Market Rule, possible misrepresentations to the Commission, possibly unjustified extensions of time to construct new facilities, and other possible violations. *Trafficking in Broadcast Station Licenses and Construction Permits*, H.R. Rep. No. 256, 91st. Cong., 1st Sess. (1969). In the ABC/ITT merger case, also cited by LIN, the Commisison considered the extent to which the public interest would be affected by the possible anticompetitive and alleged "news management" consequences of the proposed merger versus the potential benefits from the merger, as required by Section 310(d), but did not engage in a comparison of the relative qualifications and prospective services of transferor and transferee, as LIN seeks here. *American Broadcasting Co., Inc.*, 9 FCC2d 546 (1967). In the Turner/CBS case, the Commission scheduled oral argument on Turner's basic qualifications and the compliance of the proposed acquisition with the Commission's rules and policies on diversity and economic competition, but, again, did not undertake a comparison between the transferor and transferee. *See Public Notice* "Notice of Hearings in Turner Broadcasting/CBS, Inc. Transfer," July 11, 1985.

[5] It is also noteworthy that in hearings leading to the passage of Section 310(d), Acting Chairman Hyde had testified that, even under the former Section 310, the public interest standard of the Act "might very well permit" the Commission to allow a transfer "notwithstanding the fact that the transferor or original holder on a strictly comparative basis might be the better." *Hearing on S. 1973 Before Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 81st Cong., 1st Sess. at 35 (1949).

[6] The issues regarding compliance with Commission rules and policies are individually disposed of below.

[7] On July 28, 1989, McCaw reduced its offer from $120 per share to $110 per share.

[8] On June 23, 1989, McCaw notified the Commission, on Form 430, of the June 20, 1989 sale of stock to British Telecom for approximately $1.3 billion. McCaw states that $1.0 billion of that cash will be used for this transaction.

[9] Originally, LIN also questioned whether the $2 billion credit facility at issue here was in addition to or included an existing $1.3 billion line of credit, of which $1.0 billion is available. The July 5 letter clarified the bank's intent by stating that the $2 billion is an additional credit line, for a total of $3.3 billion, of which $3.0 billion will be available. In subsequent pleadings, LIN has ceased arguing this point, and that issue is resolved by this explanation in the July 5 letter.

[10] LIN also challenged the sufficiency of the Morgan Stanley letter, but McCaw is no longer relying on Morgan Stanley to raise funds, and the letter is thus no longer relevant to the financial analysis.

[11] In support of its argument, LIN included in its Petition to Dismiss the STA an analysis performed by the investment banking firm of Wasserstein, Perella & Co., Inc. ("Wasserstein"), which it says demonstrates that McCaw is already generating operating losses at an annual rate of approximately $400 million and will face in the six years following the proposed acquisition of LIN total operating losses almost equal to the purchase price of LIN.

[12] LIN asserts that until McCaw could arrange for the liquidation of the LIN television stations, the public could receive the same poor quality of service that the Commission has observed with disapproval when interim operators temporarily run stations. *Cf. RKO General, Inc.*, 3 FCC Rcd 5057, 5058-59 (1988). In addition, according to LIN, the stations' network affiliation contracts with CBS and NBC are in jeopardy because of the transfer of control.

[13] According to LIN, McCaw recently admitted in a prospectus filed at the Securities and Exchange Commission ("SEC") that: (a) its post-acquisition indebtedness "could exceed $7 billion either on the date of consummation or within a few years thereafter"; (b) its net losses will "increase significantly for the foreseeable future and could exceed $1 billion per year in some years"; (c) the shortfall between debt service and revenues will require additional borrowing (or asset sales or equity assistance); and (d) McCaw does not expect to have sufficient internally generated funds to repay its indebtedness at maturity.

[14] LIN submitted a study by Frazier, Gross & Kadlec, Inc. which analyzes McCaw's options for operating the LIN properties. The study concludes that McCaw's other operations cannot generate sufficient cash flow to pay interest on its debt, and that, assuming that the *status quo* is maintained with respect to the management of the LIN properties, the same will not generate sufficent cash to cover the increased interest payments. Therefore, according to the study, if McCaw does not sell the LIN properties, it will have to cut back expenditures in order to increase cash flow. However, the additional cash flow allegedly would not be sufficient to cover the interest payments. This in turn would impair the cellular and television stations' provision of service to the public.

[15] According to LIN, it reinvests television earnings in station capital improvements, rather than using such earnings to make interest payments. McCaw, however, because of its high debt-to-equity ratio, would have to cut back on personnel, especially news and public affairs programming, LIN asserts, and would have to defer additions and modernization of facilities and equipment. Moreover, McCaw would have to reduce the costs of syndicated programming for television stations. According to LIN, all these reductions would lead to lower ratings and lower revenues. With the transfers of control, the television stations' network compensations could be reduced, which cutbacks McCaw cannot afford, according to LIN. For the cellular systems, LIN maintains that a continuing commitment to a capital improvement program (geographic expansion, service improvement in high usage areas, increases in switch capacity, and conversion to digital technology) is an essential element in securing a competitive market share and adequate market penetration. In addition, personnel cutbacks are tantamount to poorer quality of service, which would result in weakening the systems' market shares and revenues, LIN asserts.

[16] LIN does not controvert this credible explanation, and its argument that this SEC submission evidences a lack of candor by McCaw in its submissions to this Commission regarding its financial prospects is without merit.

[17] By acquiring LIN, McCaw states, it will be able to complete several of its regional networks and expand its cellular service to other major markets, and that such integration will enable McCaw to take advantage of proven efficiencies and provide more rapid and effective service to the public.

[18] *See* Sections 22.917, 73.4099, 73.4100 and 73.4101 of the Commission's rules.

[19] This balance sheet is current as of March 31, 1989. *See* Section 22.917(a)(3)(i) and Schedule 14D-1 and Schedule 13D filed by McCaw pursuant to Sections 14 and 13 of the Securities and Exchange Act of 1934, as amended.

[20] The letter also mentions that the funds will be available subject to a number of conditions, such as the successful negotiation of loan documentation, satisfactory to the bank. Moreover, the letter mentions that the final pricing, terms and amortization schedule would be established based upon credit conditions prevailing at the time the facility is negotiated. The interest rate is anticipated to be in the range of the bank's "prime" lending rate plus 0% to 1 1/2% and final maturity would not be longer than ten years. In addition, the letter projects an amortization schedule which provides for payments of interest only during up to a five-year revolving credit period and uneven quarterly amortization of principal during the period following such revolving period or later final maturity date should circumstances so warrant.

[21] Unlike *Intercontinental Communications / Cellular, Inc.*, 4 FCC Rcd 2702 (1989), in which a specific commitment from each participating bank was required, this case does not involve financing for a construction permit for new cellular facilities. Thus, there is not the same concern that assigned spectrum may lie fallow if financing is not ultimately forthcoming.

[22] LIN's related allegations regarding the superior cellular service it would provide if permitted to retain the licenses are not relevant, as discussed in paragraphs 7-10, *supra*.

[23] Such transfers generally do not raise questions with regard to speculative and insincere applicants as do transfers of bare construction permits. For this reason, the proposed transfer of a bare construction permit requires the proposed transferee to demonstrate the financial ability to construct and operate the system for one year. *See McCaw Personal Communications, Inc.*, 60 RR2d 889, 895 (Com. Car. Bur. 1986).

[24] *See* paragraph 22, *supra*.

[25] The British Government has a 48% ownership interest in British Telecom plc, the parent of British Telecom.

[26] *McCaw Cellular Communications, Inc.*, 4 FCC Rcd 3784 (1989).

[27] In support of its claims, LIN misstates or mischaraterizes British Telecom's minority investor rights, according to McCaw. McCaw asserts that British Telecom only has the right to challenge board nominations for failure to meet standards designed to ensure that the directors are in fact "independent." Similarly, McCaw maintains that in the case of approval rights, British Telecom's consent cannot be unreasonably withheld. Accordingly, the Common Carrier Bureau found that all of the approval rights were consistent with accepted minority shareholder safeguards, McCaw argues.

[28] McCaw states that it owns seventeen cellular systems in California, and eight systems in Texas. Therefore, it is reasonable to assume that the acquisition of the LIN Los Angeles, Dallas and Houston systems would help McCaw complete its California and Texas regional networks.

[29] The Bureau analyzed the acquisition of McCaw stock under Section 310(b)(4) of the Act because McCaw itself does not hold licenses, but rather controls Commission licensees through wholly-owned subsidiaries.

[30] Three of the remaining five directors would be independent directors designated by Craig McCaw. The Purchase Agreement required that they be U.S. citizens and have no family, business or other relationship with any of the officers, directors or shareholders holding more than one percent of McCaw's stock, or any other relationships compromising their independence. The other two directors would be designated by the two remaining minority shareholders. *McCaw Cellular, supra* at 3785-86.

[31] McCaw and British Telecom were under no obligation to reveal to the Commission the final purchase agreement entered into between them, as long as it generally followed the agreement previously reviewed by the Commission. Moreover, the deletion of the clause was not prejudicial, since we had approved the transaction with a purchase agreement which included the noncompetition clause. As a matter of fact, in *McCaw Cellular, supra* at para. 43, we concluded that prior approval of the transaction was not required because the transaction did not involve a transfer of control. LIN's argument that the Commission, LIN, and other parties are entitled to know what other changes were made to the agreement is therefore meritless.

[32] This condition later became know as a "Dallas-like" condition. In conditioning the transfer to Pacific, the Commission stated that

> where Pacific would be a partner with someone who is its competitor in another market, we recognize that there is a potential for an anticompetitive flow of information

between competitors. *See e. g., United States of America v. Pacific Telesis Group*, No. CV-86-1298 (C.D. Cal.) (in order to avoid the possibility of collusion Pacific agreed to limit its role in the Dallas-Ft. Worth Partnerships). In addition, because of Pacific's presence in both the San Francisco and the Sacramento markets (in the first case as a partner in the nonwireline systems; in the second as the wireline licensee), we will condition our approval on Pacific's agreement not to become involved in negotiations or partnership voting or information flows in the San Francisco market leading to joint operation or other arrangements, other than those relating to the provision of service to roamers . . . . We take this action in order to guarantee the free flow of information in the partnerships and to eliminate any possibility of Pacific discouraging agreements between the nonwireline partners in both markets.

James F. Rill, 60 RR2d 583, 598 (1986).

[33] The Cable Communications Policy Act of 1984, Public Law 98-549, 98 Stat. 2780, October 30, 1984.

[34] LIN cites Sections 73.3555 note 2(h) and 76.501 note 2(h) of the Commission's rules (47 C.F.R. §§ 73.3555, 76.501) and *Report and Order* in Docket No. 20521, 97 FCC2d 997 (1984).

[35] In opposing the STA application, LIN contended that when McCaw submitted an Ownership Report to LIN for submission to the Commission, McCaw failed to report Malone's position as director of United Artists Communications, which together with TCI, has a controlling interest in the licensee of two radio stations in the same city as one of LIN's television stations (Grand Rapids, Michigan). LIN also contended that McCaw should have reported Malone's position on the board of directors of Turner Broadcasting System, Inc., licensee of WTBS(TV), Atlanta, Georgia.

[36] The Commission's reporting requirements require a separate ownership report to be filed for any entity that owns an attributable interest (generally 5% or more of the voting stock) in a company that is required to file a report. 47 C.F.R. §73.3615(iv)(B). At the time, McCaw held a little more than 5% of the outstanding LIN stock, and LIN requested an Ownership Report from McCaw.

[37] McCaw's failure to list Malone's indirect interest in two radio stations in Grand Rapids, Michigan is an excusable oversight. That interest was arguably unattributable, and at any rate has now been disclosed. Such an oversight is not of decisional significance, as LIN apparently recognizes by not repeating it in its long-form petition.

[38] 47 C.F.R. §76.501, note 2(h).

[39] We note that LIN did not challenge McCaw's position regarding Malone's insulation when an Ownership Report was originally provided to them by McCaw for their use.

[40] McCaw has already indicated its willingness to take whatever additional steps the Commission deems necessary to ensure proper insulation of Malone from the television stations.

[41] *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891 (W.D. Mo. 1985); *aff'd* , 800 F.2d 711 (8th Cir. 1986); *cert. denied*, 480 U.S. 910 (1987).

[42] TEMPO Satellite, Inc., a wholly owned subsidiary of TCI, is an applicant for an authorization in the Direct Broadcast Satellite ("DBS") service. *Continental Satellite Corporation*, FCC 89-257, released August 15, 1989. On August 2, 1989, a letter was sent by the Mass Media Bureau to TEMPO requesting information regarding the facts and circumstances surrounding the Jefferson City case.

[43] LIN cites *WTAR Radio-TV Corp. (Landmark Communications)*, 48 FCC2d 1147, 1150-51 (1974); *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982).

[44] LIN cites *RKO General, Inc. v. FCC, supra* at 229.

[45] It is also noted that McCaw would have little reason to attempt to mislead the Commission in this way, as the same amendment lists recent Commission cases in which McCarthy's qualifications were favorably passed on.

[46] It is also noted that the Private Radio Bureau is today granting the applications, File Nos. 901415, 901416, for transfer of control of Private Operational Fixed Microwave Station WNEM 522 to MMM Holdings, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-93

In the Matter of

Amendment of Section 73.202(b), RM-5632
Table of Allotments,
FM Broadcast Stations.
(Montour Falls, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 22, 1989; Released: September 15, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the *Request for Supplemental Information* (" *RSI* "), 4 FCC Rcd 2179 (1989), issued in response to the request of Twin Tiers Communications Corp. (petitioner). Petitioner requested the substitution of Channel 258A for Channel 285A at Montour Falls, New York, and the modification of its license for Station WNGZ-FM to specify operation on the substitute channel. The *RSI* requested the petitioner to furnish additional information showing that it had reasonable assurances that the transmitter site it proposed to utilize was available to it and that the necessary FAA approval could be obtained. Kevin M. Fitzgerald ("Fitzgerald") filed comments requesting the allotment of Channel 270A in lieu of Channel 258A to Montour Falls in order to permit the allotment of Channel 258A to Southport, New York. However, the petitioner did not file comments in response to the *RSI*.

2. In light of petitioner's failure to respond to the *RSI* we are unable to determine that the transmitter site it proposes to utilize is actually available. Therefore, in accordance with Commission policy, no further consideration will be given to the request to substitute Channel 258A for Channel 285A at Montour Falls, New York. We also will not consider Fitzgerald's request to substitute Channel 270A for Channel 258A at Montour Falls, as we are unable to determine that Twin Tiers has a continuing interest in pursuing its proposal.

3. Accordingly, IT IS ORDERED, That the above described petition for rule making filed by Twin Tiers Communications Corp. IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-587

In the Matter of

Amendment of Section 73.202(b),	RM-6471
Table of Allotments,	RM-6689
FM Broadcast Stations.	
(Comanche and Snyder, Oklahoma)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 22, 1989; Released: September 15, 1989

By the Chief, Allocations Branch:

1. At the request of Harold E. Cochran (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 433 (1989), proposing the substitution of Channel 245C2 for Channel 244A at Comanche, Oklahoma, and the modification of its license for Station KDDQ to specify operation on the higher powered channel. Petitioner and Leland Lafferty ("Lafferty") filed comments. Lafferty's comments also included a counterproposal requesting the allotment of Channel 245A to Snyder, Oklahoma, as the community's first local FM service.[2] Petitioner filed reply comments. Comanche and Snyder are located 98 kilometers apart but the Commission's Rules stipulate a 163 kilometer separation between co-channel Class A and C2 allotments. Thus, the two proposals are mutually exclusive.

2. Lafferty states that the allotment of Channel 245A to Snyder as its first local service should be preferred over the upgrading of an existing station at Comanche. He states that he will apply for the channel, if allotted.

3. Petitioner reiterates his intention to apply for Channel 245C2, if allotted to Comanche. He also states that a comparison of the two communities need not be made. Instead, petitioner submits that Channel 235A, 262A, 264A or 273A can be allotted to Snyder, without conflicting with the Comanche proposal, thus enabling Snyder to receive its first local service while Comanche and its environs receives expanded service from Station KDDQ.

4. After reviewing the pleadings before us, we find that the public interest would be served by providing Snyder with its first local FM service and providing Comanche and its environs with expanded service. In addition, we have confirmed that alternate channels are available for Snyder, thus obviating the need to comparatively consider the needs of the two communities. Channel 262A can be allotted to Snyder in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.1 kilometers (0.7 miles) west to avoid a short-spacing to Station KATT-FM, Channel 263C, Oklahoma City, Oklahoma, and Channel 245C2 can be allotted to Comanche at Station KDDQ's present transmitter site. [3]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 30, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Comanche, Oklahoma	245C2
Snyder, Oklahoma	262A

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Harold E. Cochran for Station KDDQ, Comanche, Oklahoma, IS MODIFIED to specify operation on Channel 245C2 in lieu of Channel 245A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. The window period for filing applications for Channel 262A at Snyder, Oklahoma, will open on **October 31, 1989,** and close on **November 30, 1989.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Snyder has been added to the caption.

[2] Public Notice of the counterproposal was given on March 17, 1989, Report No. 1771.

[3] The coordinates for Channel 262A at Snyder are North Latitude 34-39-36 and West Longitude 98-57-11. The coordinates for Channel 245C2 at Comanche are North Latitude 34-26-12 and West Longitude 97-54-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-389

In the Matter of

Amendment of Section 73.202(b), RM-6821
Table of Allotments,
FM Broadcast Stations.
(Abbeville, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 21, 1989; Released: September 15, 1989

By the Chief, Allocations Branch:

1. At the request of Abbeville Broadcasting Service, Inc. (petitioner), the Commission has before it for consideration a petition for rule making requesting the substitution of Channel 286C3 for Channel 285A at Abbeville, Louisiana, and the modification of its license for Station KROF-FM at Abbeville to specify operation on the higher powered channel. The proposal could provide Abbeville with its first expanded FM service.

2. Petitioner states that the upgrade can be accomplished from Station KROF-FM's authorized transmitter site. Our engineering analysis confirms that Channel 286C3 can be allotted to Abbeville at the station's current transmitter site consistent with the Commission's minimum distance separation requirements.[1] Therefore, as requested, we shall propose to modify the license for Channel 285A at Abbeville to specify operation on Channel 286C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Abbeville.

3. In view of the fact that Abbeville, Louisiana, could receive its first wide coverage area FM station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Abbeville, Louisiana	285A	286C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 6, 1989,** and reply comments on or before **November 21, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Charles L. Spencer, Esquire
Hebert & Spencer
Old Warden's House
701 Laurel Street
Baton Rouge, LA 70802
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 30-00-40 and 92-07-21.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-390

In the Matter of

Amendment of Section 73.202(b), RM-6762
Table of Allotments,
FM Broadcast Stations.
(St. George, Utah)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 21, 1989; Released: September 15, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Color Country Broadcasting Corporation (petitioner), seeking the allotment of Channel 240C to St. George, Utah, as that community's third local FM service. Petitioner states its intention to file an application for the new channel, if allotted.

2. Channel 240C can be allotted to St. George in compliance with the Commission's minimum separation requirements with a site restriction of 29.6 kilometers (18.4 miles) south of the city,[1] as requested by the petitioner. Petitioner contends that the specified site restriction is necessary to avoid "environmentally sensitive areas" around St. George.

3. We believe the public interest would be served by proposing the allotment of Channel 240C to St. George, Utah, based on an expressed interest in providing that community with its third local FM service. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
St. George, Utah	228A, 259C	228A, 240C, 259C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 6, 1989,** and reply comments on or before **November 21, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Eugene T. Smith, Esquire
715 G Street, S.E.
Washington, D. C. 20003
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The restricted site coordinates are 36-50-50 and 113-29-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-90

In the Matter of

Amendment of Section 73.202(b),	RM-6674
Table of Allotments,	RM-6790
FM Broadcast Stations.	
(Kosciusko, Mississippi)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 21, 1989; Released: September 15, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 3761 (1989), proposing the allotment of a Class A FM channel to Kosciusko, Mississippi, as that community's second FM broadcast service. The *Notice* was issued in response to a petition filed by G. Michael Comfort (petitioner). Petitioner filed a counterproposal to the *Notice*.[1] No other comments were received.

2. In his counterproposal, petitioner requested the allotment of Channel 277C3 to Kosciusko, Mississippi, in lieu of a Class A channel.[2] According to petitioner, a C3 channel at Kosciusko would be more capable of covering the community and surrounding rural area and would stand a better chance of economic viability than would a smaller Class A facility. Petitioner expressed a continuing interest in the allotment of a new channel at Kosciusko, and will file an application to construct and operate a new FM facility in the community.

3. Based on the above information, we believe the public interest would be served by the allotment of Channel 277C3 to Kosciusko, Mississippi, as that community's second FM broadcast service. Channel 277C3 can be allotted to Kosciusko in compliance with Section 73.207 of the Commission's Rules provided there is a site restriction 15.5 kilometers (9.7 miles) southwest of the community. [3] The site restriction will prevent a conflict with a construction permit for Station WMBC-FM, Channel 276C2 at Columbus, Mississippi, and with a new rule making proposal to add Channel 280A at Ebenezer, Mississippi (RM-6774).

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 30, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Kosciusko, Mississippi	277C3, 286C1

5. The window period for filing applications for Channel 277C3 at Kosciusko, Mississippi, will open on **October 31, 1989,** and close on **November 30, 1989.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the counterproposal was given on June 22, 1989, Report No. 1784 (RM-6790).

[2] Although the counter proposal does not conflict with the proposal, we have accepted the counter proposal since it was filed by the petitioner and involves the same community.

[3] The coordinates for Channel 277C3 are 32-58-38 and 89-73-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-487

In the Matter of

Amendment of Section 73.202(b), RM-5133
Table of Allotments
FM Broadcast Stations
(Fernandina Beach, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 5, 1989; Released: September 15, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making* in this proceeding, 2 FCC Rcd 741 (1987), proposing the allotment of Channel 287A to Fernandina Beach, Florida. Northeast Florida Radio, Inc. and Custom Services, Inc. filed comments in support of the proposed allotment. General Broadcasting of Florida, Inc. filed comments and a "Motion to Consolidate Proceedings." Emission de Balmaseda, Inc. filed an "Opposition to Motion to Consolidate Proceedings." For the reasons discussed below, we allot Channel 287A to Fernandina Beach, Florida, and dismiss General Broadcasting's Motion for Consolidation.

BACKGROUND

2. This proceeding began when Northeast Florida Radio, Inc. ("Northeast") filed a petition for rule making proposing the allotment of Channel 287A to Fernandina Beach, Florida. Thereafter, Radio Representatives, Inc. filed a separate petition for rule making proposing a conflicting Channel 287A allotment at Baldwin, Florida. So that we might allot FM channels to both communities, we issued two *Notices of Proposed Rule Making*. The *Notice* issued in this proceeding proposed the allotment of Channel 287A to Fernandina Beach. The second *Notice*, issued in MM Docket No. 87-77, proposed to allot Channel 227A to Baldwin in order to accommodate Channel 287A at Fernandina Beach. 2 FCC Rcd 2033 (1987). This avoided the need for a comparative rule making proceeding to resolve Northeast's and Radio Representatives conflicting petitions.

3. Prior to the adoption of the *Notices* for Baldwin and Fernandina Beach, we adopted a *Report and Order* in MM Docket No. 85-376 allotting Channel 293A to Ponte Vedra Beach, Florida. 2 FCC Rcd 1182 (1987). In response to the *Notice of Proposed Rule Making* in MM Docket No. 85-376 proposing the allotment of Channel 293A to Ponte Vedra Beach, General Broadcasting of Florida, Inc. ("General Broadcasting"), licensee of Station WCAT-FM, Channel 294C1, Leesburg, Florida, had filed a counterproposal proposing the allotment of Channel 227A to Ponte Vedra Beach. In its counterproposal, General Broadcasting stated that the proposed allotment of Channel 293A to Ponte Vedra Beach would preclude grant of its application to maintain full Class C status at Station WCAT-FM (File No. BPH-860310II). In denying the General Broadcasting counterpropsal, we noted that a Channel 227A allotment at Ponte Vedra Beach would preclude a Channel 227A allotment at Baldwin. Shortly thereafter, we adopted the *Notice of Proposed Rule Making* in MM Docket No. 87-77 proposing Channel 227A for Baldwin. General Broadcasting filed a petition for reconsideration directed against the *Report and Order* allotting Channel 293A to Ponte Vedra Beach, Florida.

4. In this proceeding, General Broadcasting filed comments and a "Motion to Consolidate Proceedings." In its comments, General Broadcasting referred to its petition for reconsideration in the Ponte Vedra Beach proceeding. General Broadcasting suggested that Channel 223A be allotted to Ponte Vedra Beach in order that Channel 227A might be allotted to Baldwin and that Channel 287A might be allotted to Fernandina Beach. This would, in turn, have permitted the grant of its application to maintain full Class C status at Station WCAT-FM. To achieve this result, General Broadcasting requested that the docketed proceedings for Ponte Vedra Beach, Baldwin and Fernandina Beach be consolidated.

DISCUSSION

5. We dismiss the "Motion to Consolidate Proceedings" filed by General Broadcasting because General Broadcasting would no longer be aggrieved by any allotment that we may make to Fernandina Beach, Baldwin or Ponte Vedra Beach.[1] On May 10, 1988, General Broadcasting amended its application, which had originally proposed to maintain full Class C status for Station WCAT-FM, to specify Class C1 facilities. The amended application was granted on June 7, 1988. As a result of that action, the Table of FM Allotments is amended to reflect a Class C1 allotment for Leesburg. *See Reclassification of FM Facilities Pursuant to Broadcast Docket No. 80 - 90*, 2 FCC Rcd 2124 (1987). After the Table is amended, the prescribed procedure for General Broadcasting to attain Class C status for Station WCAT-FM would be to file a petition for rule making. General Broadcasting has not done so. In fact, in its Petition for Leave to Amend in BPH-860310II, General Broadcasting specifically stated that its amendment specifying Class C1 facilities would end "litigation surrounding retention of General's Class C status." As a result, General Broadcasting is not affected by any channel which we may allot at Fernandina Beach, and there is no reason to consolidate any of these proceedings.

6. We find that it is in the public interest to allot Channel 287A to Fernandina Beach, Florida as a first local FM service.[2] Channel 287A can be allotted in compliance with the minimum spacing requirements set forth in Section 73.207 of the Commission's Rules.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 30, 1989,** the Table of FM Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED as follows:

Community	Channel No.
Fernandina Beach, Florida	287A

8. The window period for filing applications for the Channel 287A allotment at Fernandina Beach, Florida, will open on **October 31, 1989,** and close on **November 30, 1989.**

9. IT IS FURTHER ORDERED, That the "Motion to Consolidate Proceedings" filed by General Broadcasting of Florida, Inc. IS DISMISSED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Mattox-Guest Broadcasting, Inc. filed a "Motion for Extension of Time" to file an opposition to the General Broadcasting "Motion to Consolidate Proceedings." In view of our action dismissing the General Broadcasting "Motion to Consolidate Proceedings", we are hereby dismissing the Mattox-Guest Broadcasting, Inc. "Motion for Extension of Time" as moot.

[2] The reference coordinates for Channel 287A at Fernandina Beach, Florida are 30-40-06 and 81-27-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Intercambio, Inc., File No. ENF 88-03

Apparent Liability for Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1989; Released: September 18, 1989

By the Commission: Commissioner Dennis concurring and issuing a statement.

1. On July 6, 1988, we released a *Notice of Apparent Liability*, 3 FCC Rcd 7247 (1988) (NAL) in the above-captioned proceeding. We concluded therein that Intercambio, Inc. (Intercambio) had transmitted obscene material over the interstate telephone network in violation of Section 223(b) of the Communications Act (Act), 47 U.S.C. § 223(b).[1] We found Intercambio apparently liable for forfeiture in the amount of $600,000 for its willful and repeated violations of the Act, and allowed 30 days from the release date of the NAL for Intercambio to respond, either by paying the forfeiture amount or explaining why the forfeiture should be reduced or not imposed at all. We also ordered it to produce relevant tapes or transcripts of its messages as well as other specific information about the corporation. On August 26, 1988, we received Intercambio's Response to Notice of Apparent Liability (Response). This document did not respond in full to the requirements of the NAL and, indeed, as explained below, did not address many of the key issues discussed in the NAL.

I. BACKGROUND

2. The facts and circumstances leading to the issuance of our NAL are recited therein and need not be reiterated at length. This proceeding was initiated in a complaint filed September 30, 1987, which alleged that Intercambio transmitted obscene messages in violation of Section 223(b) of the Act. The complainant expressed concern over the long-term effects "dial-a-porn" may have on complainant's son who, in 2½ months, placed over 280 calls to various dial-a-porn providers, including Intercambio. The complaint stated that complainant's son was now seeing a psychiatrist on a weekly basis.

3. On December 7, 1987, the Common Carrier Bureau sent a letter to Intercambio requesting it to respond to the issues raised by the complaint. Intercambio responded on January 20, 1988, denying any violation of Section 223(b), claiming, *inter alia*, that its service was intended to be only intrastate, that it had attempted to restrict access to minors, and that the statute and our Rules were unconstitutional.

4. During the subsequent staff investigation, which lasted more than four months, the Field Operations Bureau (FOB) accessed and recorded Intercambio's messages over 100 times, mostly during the day when children could be expected to be able to call. FOB found no restrictions in place to prevent minors from accessing Intercambio's messages. Nor did it find any restrictions in place to prevent interstate calls. As a result of its investigation, the staff found the evidence conclusive that Intercambio's messages were obscene and that it had in fact operated and was continuing to operate in violation of Section 223(b).

II. DISCUSSION

5. We have reviewed the response of Intercambio to the NAL at length and find it has raised no new material questions of fact to support its contention that it had not "violated FCC regulations" and that a $600,000 forfeiture was "both unjustified and unlawful."[2] Intercambio seeks to justify its position by relying on the content of its earlier response to a letter from the Chief of the Common Carrier Bureau, originally filed January 20, 1988, and reiterates certain arguments that we have already considered in our NAL. No basis was provided to warrant reconsideration here.

6. Intercambio asserts that we lack the statutory authority to require it to submit certain information or tape recordings and transcripts of its messages as requested in the NAL and refused to submit that material. [3] Section 4(j) of the Act authorizes the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). The Act further provides that the Commission may "issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). No legal precedent has been provided to support Intercambio's position which is at variance with this statutory authority and we conclude it is without merit.

7. Following Intercambio's refusal to provide the tapes, transcripts and information as ordered in our NAL, subpoenas were served November 14, 1988, on Intercambio's president and designated agent for service, Daniel W. Glassoff, and vice president, Marc Glassoff, requiring Intercambio to produce the materials. Intercambio submitted a portion of the information requested but maintains that many of the corporate documents subpoenaed as well as tapes or transcripts of its messages do not exist.

8. Intercambio further asserts, without legal support, that our earlier conclusions are an "erroneous interpretation of the FCC code" and claims that it is neither in violation of the law nor liable for forfeiture.[4] Intercambio argues that since, in its view, there has been no violation of Section 223(b), no enforcement action should be taken. Intercambio's position is one we rejected in the NAL because it was without factual basis and no information has been provided which would sustain a contrary result herein.

9. In a letter dated November 1, 1988, filed separate from its Response, Intercambio claimed that because of its apparent inability to pay, our $600,000 forfeiture was unreasonable. This was the sole mitigating circumstance raised by Intercambio in its opposition to the amount of the forfeiture. The letter was accompanied by an unaudited, uncertified document which purports to be an income statement for the period October 1, 1987, to November 30, 1988.

10. When determining the amount of forfeiture to be imposed, we are required to consider such factors, *inter alia*, as the nature, circumstances, extent, and gravity of the prohibited acts committed and the degree of the violator's culpability, as well as ability to pay.[5] Under Section 223(b), a $50,000 forfeiture penalty could have been assessed for each of the 70 days of violation, which would have totalled well in excess of $1,000,000. However, applying the above standard to the violations at issue here, we explained in the NAL that our determination of a forfeiture in the more reasonable amount of $600,000 for Intercambio's actions was based on our assessment of the totality of the circumstances as well as the factors above.

11. Intercambio claims that its "income statement" shows a decline in net income due to a change to a less profitable programming format in order to comply with "Federal Regulations." Intercambio, relying on this material, argues that it is financially incapable of paying the forfeiture at issue. We have reviewed the document and conclude that it is insufficient to support the position set forth by Intercambio. Setting aside the probity of an unsigned, uncertified document, unsupported by any affidavit attesting to its accuracy, this statement reports only income and expenses. It is of little significance in determining actual ability to pay. Further, we note that even if the submission had probative value, the violator's ability to pay is only one factor to be considered among others. In light of the gravity and the duration of Intercambio's offenses and its apparent ability to profit from such actions, and after considering all other relevant factors, we conclude that a fine of $600,000 is reasonable on the facts of this case.

III. CONCLUSION

12. After reviewing the information filed by Intercambio in its Response, we find that nothing new has been presented to persuade us that there is any basis for reconsidering our NAL. Nor has Intercambio shown any mitigating circumstances sufficient to warrant our rescinding or reducing the $600,000 forfeiture penalty for which Intercambio is liable.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that Intercambio, Inc. FORFEIT to the United States Government the sum of six hundred thousand dollars ($600,000) for violations of Section 223(b) of the Communications Act. Payment may be made in the manner provided for in Section 1.80(h) of our Rules within 30 days from the release of this Order.[6] If the forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act.

14. IT IS FURTHER ORDERED, that a copy of this Memorandum Opinion and Order shall be sent by certified United States mail, return receipt requested, to Intercambio's designated agent for service, Dan Glassoff, 1500 Purson Lane, Lafayette, CA 94549.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 223(b), at the time of violation, provided in pertinent part that no person may knowingly make obscene or indecent communication, directly or by recording device, over the interstate telephone network, for commercial purposes to any person under 18 years of age or to any other nonconsenting person.

[2] Response at 1. While Intercambio denies that it violated any Commission Rule, it has never addressed our finding that it violated Section 223(b) of the Act.

[3] Response at 2.

[4] *Id.*

[5] 47 C.F.R. § 1.80(b)(3). In our NAL, we explained that in order to protect the due process rights of Intercambio, we would use Section 1.80 of our Rules as a procedural guideline, even though the forfeiture itself would be imposed pursuant to Section 223(b) of the Act.

[6] Such a forfeiture amount should be paid by check or mail order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Forfeiture Unit, Financial Services Branch, F.C.C., Box 19209, Washington, D.C. 20554, or delivered to the Forfeiture Unit, Financial Services Branch, Room 452, 1919 M Street, N.W., Washington, D.C. 20036.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Intercambio, Inc., Apparent Liability for Forfeiture, File No. ENF 88-03

We should find Intercambio liable for violating Section 223 based only on proof of actual access of obscene or indecent messages by a minor. *See* Separate Statement of Commissioner Patricia Diaz Dennis, 3 FCC Rcd at 7262. We should not infer that minors heard the messages without supporting evidence.

The majority finds Intercambio liable based on the Commission's investigation, which determined that obscene messages were transmitted interstate, but not that these messages were actually accessed by minors. The *Notice of Apparent Liability* found it reasonable to conclude that, because Intercambio's messages were accessible by a simple telephone call, minors in fact regularly made interstate calls to hear these messages.[1] The record does not support such a broad conclusion.

The evidence shows that the complainant's son did access Intercambio's messages on six occasions.[2] Our *Notice of Apparent Liability* gave Intercambio the opportunity to demonstrate that the messages this minor heard were different in kind from the obscene messages later recorded by Commission investigators. Intercambio did not make such a showing. In fact, Intercambio did not submit any evidence. Given Intercambio's failure to bear

its burden, I, therefore, believe the evidence supports a finding that Intercambio transmitted obscene messages to a minor on six separate days between July and September 1987, and that a fine of $300,000 (6 × $50,000); see 47 U.S.C. Section 223 (b)) for those violations is warranted.

FOOTNOTES FOR STATEMENT

[1] In the Matter of Intercambio, Inc., *Notice of Apparent Liability*, 3 FCC Rcd 7247, 7250-7251 & n. 28 (1988).

[2] *See* Attachment to Complaint in File No. ENF-88-03.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HUGHES	CSG-89-047-ML
COMMUNICATIONS	CSG-89-048-ML
SATELLITE	CSG-89-049-ML
SERVICES, INC	CSG-89-050-ML

Applications for authority to modify its license for a 6.1-meter Ku-band antenna hub (Call Sign E890425) and up to 20,050 2.4, 1.8, and 1.2-meter VSAT fixed and transportable Ku-band earth stations (Call Signs E890426, E890427 and E890428) for the provision of services between the United States and Canada, Mexico and Latin America

RXL COM CSG-89-090-ML

Application for authority to modify its license for a 5.6-meter Ku-band transmit/receive fixed satellite earth station at Spokane, Washington (Call Sign E881159) for the provision of services between the United States and Canada, Mexico, Central America and Caribbean points

MEGASTAR, INC. CSG-89-102-ML

Applications for authority to modify its license for an 11-meter C-band earth station at Dallas, Texas (Call Sign E4969) to add the Anik and Morelos systems as points of communication for the provision of transborder satellite service

HUGHES	CSG-89-105-ML
COMMUNICATIONS	CSG-89-106-ML
SATELLITE	CSG-89-107-ML
SERVICES, INC.	CSG-89-108-ML

Application for authority to modify its license for a 6.1-meter Ku-band antenna hub located in Minneapolis, Minnesota (Call Sign E890627) and up to 20,050 1.2, 1.8, and 2.4-meter VSAT fixed and transportable Ku-band earth stations (Call Signs E890628, E890629 and E890630) for the provision of services between the United States and Canada, Mexico, Latin America and the Caribbean

DALLAS/FORT WORTH TELEPORT, LTD. CSG-89-109-(A)

Application for authority to modify its license for a fixed five-meter C-band transmit/receive earth station (Call Sign E7967) at Irving, Texas for the provision of service via the Alsat, Anik and Morelos satellite systems

CYLIX COMMUNICATIONS CORPORATION CSG-89-117-P/L

Application for authority to construct and operate a 2.4-meter Ku-band transmit/receive fixed earth station at Memphis, Tennessee for the provision of transborder services via the Anik and Morelos satellite systems

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: September 5, 1989; Released: September 18, 1989

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications requesting authority under Title III of the Communications Act of 1934, as amended, to modify existing domestic satellite earth station licenses and/or to construct new earth station facilities to provide transborder services between the United States and Canada, Mexico, Latin America and the Caribbean. These applications were placed on the Commission's public notice. Communications Satellite Corporation (Comsat) filed comments in response to the application filed by RXL Com, and RXL Com filed a reply. No other comments were received.

THE APPLICATIONS

2. *Hughes Communications Satellite Services, Inc. (HCSS) (File Nos. CSG - 89 - 047 - ML, CSG - 89 - 048 - ML, CSG - 89 - 049 - ML, CSG - 89 - 050 - ML, CSG - 89 - 105 - ML, CSG - 89 - 106 - ML, CSG - 89 - 107 - ML and CSG - 89 - 108 - ML).* HCSS is a wholly-owned subsidiary of Hughes Communications, Inc., which in turn is a wholly-owned subsidiary of the satellite manufacturing arm of Hughes Aircraft Company. In connection with application File Nos. CSG-89-047-ML, CSG-89-048-ML, CSG-89-049-ML and CSG-89-050-ML, HCSS has received blanket authority to construct and operate a domestic network of up to 20,050 fixed and transportable Ku-band earth stations. The HCSS "Shared Hub Service" will consist of 1.2, 1.8 and 2.4-meter VSATs that will operate in conjunction with a 6.1-meter hub terminal located in El Segundo, California. HCSS requests authority to modify its licenses for the 6.1-meter Ku-band hub earth station at Los Angeles, California (Call Sign 890425) and 2.4, 1.8

and 1.2-meter Ku-band VSAT earth stations (Call Signs E890426, E890427 and E890428) to establish and operate channels of communication with all Ku-band satellites which have been or will be consulted under Article XIV of the INTELSAT Agreement to provide high-speed data, one-way video and digitized voice transmission to Canada, Mexico, Latin America and Caribbean countries, as well as two-way services between the United States and Canada and Mexico. HCSS states its Shared Hub Service has been designed to provide shared hub VSAT network services to its customers, provide a test-bed for internal network development activities and to provide demonstration and pilot network services for customers.

3. Similarly, with regard to application File Nos. CSG-89-105-ML, CSG-89-106-ML, CSG-89-107-ML and CSG-89-108-ML, HCSS seeks authority to modify its license for a 6.1-meter Ku-band antenna hub located in Minneapolis, Minnesota (Call Sign E890627) and up to 20,050 1.2, 1.8, and 2.4-meter VSAT fixed and transportable Ku-band earth stations (Call Signs E890628, E890629 and E890630) for the provision of high-speed data, one-way video and digitized voice transmission to or from Canada, Mexico, Latin America and the Caribbean countries, as well as two-way services between the United States and Canada and Mexico to the extent such services have been consulted under Article XIV.

4. *RXL COM (RXL) (File No. CSG - 89 - 090 - ML).* RXL seeks authority to modify its license for a 5.6-meter Ku-band transmit/receive fixed satellite earth station at Spokane, Washington (Call Sign E881159) for the provision of services between the United States and Canada, Mexico, Central America and Caribbean points via the Anik and Morelos systems as well as all U.S. satellite systems consulted with INTELSAT pursuant to Article XIV(d). RXL is a joint venture of two domestic U.S. corporations, Bigfoot Communications, Inc. and Skyrock, Inc., which according to RXL, were formed to develop and distribute instructional programming via satellite to school districts nationwide. RXL states that it does not intend to use its authority for the transmission of programming to the general public nor to operate as a common carrier.

5. On July 3, 1989, Comsat filed brief comments which state that RXL's application does not mention nor attempt to meet the Buckley criteria.[1] Accordingly, Comsat recommended that the application of RXL be denied in its then present form. On July 17, 1989,[2] RXL provided an amendment to its application which states that it provides satellite services to an educational agency which offers programming for five classes daily in ten states from Alaska to Missouri. RXL states that it currently provides its programming on a domestic satellite that has been consulted for transborder operations, adding that international program suppliers have also expressed interest in making their programs available for reception and retransmission by RXL. In addition to the educational services, RXL states it provides satellite services to teleconference business clients with interests in the United States, Canada and other international points which need simultaneous domestic and international service. RXL states that to provide its domestic service through INTELSAT would be impractical and uneconomical. [3] RXL concludes that it cannot provide the educational and other services that it has committed to do, on a cost effective basis, if it is also required to work through INTELSAT to reach international points of communication.

6. *Megastar, Inc. (Megastar) (File No. CSG - 89 - 102 - ML).* Megastar seeks authority to modify its license for an 11-meter C-band earth station at Dallas, Texas (Call Sign E4069) for the provision of services via the Anik and Morelos systems. Megastar proposes to provide private line data and voice, as well as video traffic, in response to customer requests for service between the United States and Mexico and Canada. However, Megastar does not seek authority for tariffed or public switched traffic.

7. *Dallas / Fort Worth Teleport, Ltd. (DFWT) (File No. CSG - 89 - 109 -(A).* DFWT seeks authority to modify its license for a fixed five-meter C-band transmit/receive earth station (Call Sign E7967) at Irving, Texas for the provision of video, audio and data transmission and reception services via the Alsat, Anik and Morelos satellite systems to the extent that such domestic and foreign satellites have completed INTELSAT Article XIV(d) consultations. DFWT has previously received Section 214 authority to provide transborder communications services on a common carrier basis.

8. *Cylix Communications Corporation (Cylix) (File No. CSG - 89 - 117 - P / L).* Cylix seeks authority to construct and operate a 2.4-meter Ku-band transmit/receive fixed earth station at Memphis, Tennessee for the provision of transborder services via the Anik and Morelos satellite systems. Cylix states it will provide such services on a private, non-common carrier basis, and only to the extent that the Anik and Morelos satellite systems have undergone INTELSAT Article XIV(d) consultation for the services Cylix will provide. Cylix has previously been authorized to provide transborder services.

DISCUSSION

9. In 1981, following consultations with the Department of State, the Commission gave initial approval for the use of U.S. domestic satellites for the transmission of certain public international telecommunications services to points within the footprint of those satellites. The Commission determined that domestic satellites could be used for these services where INTELSAT is incapable of providing a service or where it would be clearly uneconomical or impractical to use the INTELSAT system for the service. Based on these criteria, the Commission has authorized over 200 applications for transborder service between the United States and Canada, Mexico, Latin America and the Caribbean locations. In addition, consultations under Article XIV(d) of the INTELSAT Agreement have been successfully completed for the provision of transborder services to several countries.[4]

10. The subject applications request authority to provide services similar to those services previously authorized under the Commission's Transborder policy and consulted under Article XIV(d) of the INTELSAT Agreement. For the most part, the applications involve the modification of domestic earth station licenses to extend existing or planned domestic networks to provide business and video services between the United States and Canada and Mexico using U.S. domestic satellites as well the Anik and Morelos satellites.[5] The Megastar application involves private line service between the United States and Canada

and the United States and Mexico, which has previously been consulted under Article XIV(d) of the INTELSAT Agreement.

11. Under these circumstances, we conclude that a grant of the subject applications is consistent with the Commission's Transborder policy and consultations completed under Article XIV(d) of the INTELSAT Agreement. The Commission has previously recognized that where the extension of existing domestic business networks is involved, use of the INTELSAT system would be both clearly impractical and uneconomical.[6] Specifically, the Commission has noted that maximum efficiency is gained through use of one satellite to link a customer's numerous business locations simultaneously. Use of the INTELSAT system would require the virtual duplication of a domestic network for each customer that wanted to add Canadian or Mexican business locations to its network. The same considerations also apply to the receive-only video services where the programming is already being transmitted throughout the United States and can be received in transborder locations on an incidental basis with the addition of a small, receive-only earth station for little or no additional cost.[7] RXL's application appears to fall within this category. According to RXL, it uses a domestic satellite to serve educational institutions in the United States. The incidental reception of this programming in transborder locations is consistent with our Transborder policy and existing INTELSAT consultations.[8] In addition, the Commission has found that use of INTELSAT facilities in such circumstances would be an inefficient use of the available radio frequency spectrum. With respect to point-to-point communications between the U.S. and Canada, the Commission has granted applications based on the recognition that such service was not previously provided by INTELSAT but by well-developed terrestrial networks.

12. Accordingly, IT IS ORDERED that the applications of HCSS (File Nos. CSG-89-047-ML, CSG-89-048-ML, CSG-89-049-ML, CSG-89-050-ML, CSG-89-105-ML, CSG-89-106-ML, CSG-89-107-ML and CSG-89-108-ML), RXL (File No. CSG-89-090-ML), Megastar (File No. CSG-89-102-ML), DFWT (File No. CSG- 89-109-(A)) and Cylix (File No. CSG-89-117-P/L) ARE GRANTED and the applicants are authorized to modify the licenses for their existing earth station facilities and/or construct new earth station facilities to provide the transborder services requested in their applications consistent with Attachments 1 and 2.

13. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by other countries involved.

14. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

15. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Letter from James L. Buckley to Mark S. Fowler, dated July 23, 1981, appended to *Transborder I; Transborder Satellite Video Services*, 88 FCC 2d 258 (1981) (setting forth the policy that applicants for transborder service must either show that INTELSAT is unable to provide the proposed service or that use of INTELSAT would be clearly uneconomical or impractical).

[2] RXL provided a telefax copy of this filing on July 14, 1989.

[3] RXL compares, by example, 50 hours per month on a domestic satellite, which would cost $17,500 with the same amount of time on INTELSAT, which would cost $165,910.

[4] *See* Attachments 1 and 2.

[5] The HCSS application also requests authority to use VSAT networks to provide high-speed data, one-way video and digitized voice transmissions to or from Latin America and Caribbean countries. Although the term one-way is used in connection with video and digitized voice transmissions and not high-speed data, we note that existing consultations under Article XIV(d) of the INTELSAT Agreement cover only one-way, receive-only video, data and audio services from the U.S. to Latin American/Caribbean locations. Also, under existing Article XIV(d) consultations, no service originating in Latin American/Caribbean locations is permitted. Thus, our authorization is limited to the provision of those services that are consistent with existing INTELSAT consultations.

[6] Satellite Business Systems, 88 FCC 2d 195 (1981).

[7] Transborder Satellite Video Services, 88 FCC 2d 258 (1981). The same considerations are applicable where Canadian and Mexican domestic video services are received in the U.S.

[8] To the extent RXL engages in teleconferencing, we note that two-way transborder services have only been consulted for Canada and Mexico.

ATTACHMENT 1

U.S. Satellites Consulted Pursuant to Article XIV(d)

Satellites

*FEDEX A
*FEDEX B
GALAXY I
*GALAXY II
GALAXY III
*GALAXY IV
*GALAXY B
GSTAR I
GSTAR II
*GSTAR III
*COMSTAR III
COMSTAR D-4
*COMSAT GEN B
SPACENET I
*SPACENET II
SPACENET III
SATCOM IR
*SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
*SATCOM K-2
SBS V
SBS I
SBS II
SBS III
**SBS IV
TELSTAR 3A
TELSTAR 302
*TELSTAR 303
CONTEL ASC-I
CONTEL ASC-II
WESTAR IV
WESTAR V
*WESTAR B
*WESTAR (79° W)

* Consulted for Latin America/Caribbean services only. Includes receive-only video programming from the U.S. to Mexico.

** Consulted for Canada and Latin America/Caribbean services only.

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATION

Country	Service[s]	Satellite[s]
Anguilla	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Antigua and Barbuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Belize	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bermuda	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
British Virgin Islands	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Canada	occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus ANIK B, C1, C2, C3, D1 and D2
Cayman Islands	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1

Colombia	T.V. receive-only	Galaxy I and III, Satcom IR, IIIR, IV and V, Westar IV, Westar V and Westar (269E)
Costa Rica	T.V. receive-only	all satellites listed in Attachment 1
Dominica	T.V., audio and data receive-only	all satellites listed in Attachment 1
Dominican Republic	T.V., audio and data receive-only	all satellites listed in Attachment 1
El Salvador	T.V. receive-only	all satellites listed in Attachment 1
Grenada	T.V., audio and data receive-only	all satellites listed in Attachment 1
Guatemala	T.V. and audio receive-only	all satellites listed in Attachment 1
Haiti	T.V., audio and data receive-only	all satellites listed in Attachment 1
Honduras	T.V. receive-only	all satellites listed in Attachment 1
Jamaica	T.V., audio and data receive-only (See note 3)	all satellites listed in Attachment 1
Mexico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus the Morelos I and II satellites
Monsterrat	T.V., and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV,

		Westar IV and V and Comstar D4
Panama	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Christopher-Nevis	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Lucia	T.V., audio and data receive-only	all satellites listed in Attachment 1
St. Vincent and the Grenadines	T.V., audio and data receive-only	all satellites listed in Attachment 1
Trinidad and Tobago	T.V. receive-only	all Galaxy, Satcom, Westar and Comstar satellites listed in Attachment 1
Turks & Caicos	T.V. and audio receive-only	all Comstar, Satcom, Westar and Galaxy satellites listed in Attachment 1
Venezuela	T.V. receive-only	all satellites listed in Attachment 1

Notes

1) With the exception of Mexico and Canada, which were consulted separately, all services (i.e. T.V., audio and data receive-only) can be provided to any point over any of the satellites listed in Attachment 1 even through only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 12, 1989

COMMON CARRIER PUBLIC MOBILE SERVICES INFORMATION

CLARIFICATION OF THE EFFECTIVE DATE FOR PART 22 APPLICANTS TO FILE ON MICROFICHE

The public is reminded that the rules in the *Report and Order*, CC Docket 88-161, released on November 16, 1988, published at 53 Fed. Reg. 48909 (December 5, 1988), as amended by the *Memorandum Opinion and Order*, released July 20, 1989, and published at 54 Fed. Reg. 31031 (July 26, 1989), are effective September 25, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

O.R. ESTMAN
d/b/a SATELLITE PAGING

Request for Stay of Lottery, PMS 31 regarding Applications For new frequency 931 MHz for station KNKK333 at Branchville and Manahawkin, New Jersey; File No. 21057-CD-P/ML-01-89

For new frequency 931 MHz for station KNKJ922 at Martinsville and Alpine, New Jersey; File No. 21068-CD-P/ML-01-89

For new frequency 931 MHz for station KNKJ333 at Burlington, New York and Allentown, New Jersey. File No. 21060-CD-P/ML-01-89

r. f. COMMUNICATIONS COMPANIES

Request for Stay of Lottery, PMS 31 regarding Applications For 900 MHz facility at Boston, Massachusetts; File No. 23951-CD-P/L-01-89

For 900 MHz facility at New York, New York; File No. 23958-CD-P/L-01-89

For 900 MHz facility at Philadelphia, Pennsylvania File No. 23966-CD-P/L-01-89

MEMORANDUM OPINION AND ORDER

Adopted: August 18, 1989; Released: August 18, 1989

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. On July 17, 1989, the Commission issued a Public Notice, Mimeo No. 3642, announcing that Lottery No. 31 for local 900 MHz paging frequencies would be held on August 23, 1989. r.f. Communications Companies ("r.f. Communications") and O.R. Estman, d/b/a Satellite Paging ("Satellite Paging") (collectively "Petitioners") submitted letters to the Commission on July 19, 1989, requesting that their applications be placed in the lottery. They were informed by the Mobile Services Division (MSD) that their applications were not filed within the 60-day "cut-off" period and would not be included in Lottery No. 31. Five other applicants did file within the 60-day "cut-off" period and will be included in Lottery No. 31. On August 3, 1989, Petitioners filed requests for placement in PMS Lottery No. 31 and on August 15, 1989, Petitioners filed petitions for stay of PMS Lottery No. 31. Despite telephonic confirmation that the requests for stay would be acted upon prior to the lottery, Petitioners filed emergency petitions for review on August 17, 1989, in the United States Court of Appeals for the District of Columbia Circuit.

II. CONTENTIONS OF THE PARTIES

2. In their identical petitions for stay, Petitioners argue that the MSD did not give notice of its procedures with respect to the local 900 MHz frequency lottery and that the procedure for determining cut-off dates for mutually exclusive applications is inadequate for 900 MHz frequencies. Petitioners further assert that once the Commission holds the lottery, their rights to obtain a license for the pertinent frequencies will be cut-off and, therefore, in order to maintain the *status quo* pending the disposition of their August 3 request for placement in the lottery, they request a stay of Lottery No. 31.

III. DISCUSSION

3. Petitioners have failed to make a sufficient showing to justify the extraordinary relief they seek. r.f. Communications and Satellite Paging have not shown that they will suffer irreparable injury if the lottery takes place as scheduled. *See Wisconsin Gas Co. v. FERC*, 758 F. 2d 669, 674 (D.C. Cir. 1985). Specifically, Petitioners' bare assertions that they would be irreparably harmed if the Commission conducts the scheduled lottery without Petitioners' participation and that they would be denied the opportunity to be an applicant and a potential lottery selectee for the remaining 900 MHz frequencies, is plainly insufficient to warrant a stay. First, the lottery procedure neither constitutes nor automatically results in the grant of a construction permit. Rather, it initiates a process which will require some time before the issuance of a construction permit. Second, even after that process is completed, it is clear that other corrective relief is available should Petitioners want to challenge the grant of a construction authorization to a lottery winner by filing a petition for reconsideration or an application for review of the grant. *Virginia Petroleum Jobbers Association v. FPC*, 259 F. 2d 921 at 925 (D. C. Cir. 1958). The Court has recognized that license grants which are challenged by litigation are subject to that litigation and may be undone if the basis of the grant is reversed as a result of the outcome of the litigation. *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 736 (D. C. Cir. 1976).

4. We find that Petitioners have failed to meet the critical irreparable harm test required for a grant of a stay as well as the additional tests for stay. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). There is no basis for Petitioners' assertion that they will succeed on the merits or that the Commission would be unable to provide them

with complete relief. In addition, the stay would harm the public in general and other interested parties because a delay of the lottery would deny expeditious service to the public.

IV. ORDERING CLAUSES

5. IT IS ORDERED, that the Petitions for Stay filed by r.f. Companies, File Nos. 23951-CD-P/L-01-89, 23958-CD-P/L-01-89, and 23966-CD-P/L-01-89 and O.R. Estman, d/b/a Satellite Paging, File Nos. 21057-CD-P/ML-01-89, 21068-CD-P/ML-01-89, and 21060-DC-P/ML-01-89 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Division

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-391

In the Matter of

Amendment of Section 73.202(b), RM-6883
Table of Allotments,
FM Broadcast Stations.
(Halfway, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 28, 1989; Released: September 18, 1989

By the Chief, Allocations Branch:

1. The Commission has before it a petition for rule making filed by Melvin Pulley (petitioner), requesting the allotment of FM Channel 226A to Halfway, Missouri, as that community's first FM broadcast service. Petitioner submitted information in support of the proposal and stated his intention to file an application for the channel.

2. We believe the proposal warrants consideration. Channel 226A can be allotted to Halfway, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 6.7 kilometers north of the community.[1] The site restriction will prevent a short spacing to Channel 225A (vacant) at Ozark, Missouri.[2]

3. In view of the fact that the proposed allotment could provide a first FM broadcast service to Halfway, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Halfway, Missouri	---	226A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 13, 1989,** and reply comments on or before **November 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Melvin Pulley
KYOO Broadcasting Company
304 E. Jackson
Bolivar, Missouri 65613

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 226 are 37-40-34 and 93-15-20.

[2] The site restriction protects the four applications on file for Channel 225A at Ozark.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-460

In the Matter of

Amendment of Section 73.202(b),	RM-6263
Table of Allotments,	RM-6214
FM Broadcast Stations.	RM-6338
(Bartow, Chauncey, Dublin, Eastman,	RM-6601
Jeffersonville, Lyons, Soperton	
and Unadilla, Georgia)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 28, 1989; Released: September 18, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 3 FCC Rcd 5750 (1988), proposing three mutually exclusive requests for rule making. Lonnie C. Carter ("Carter") seeks the allotment of Channel 267C2 to Chauncey, Georgia, as the community's first local FM service. Sol Broadcasting, Inc. ("Sol") requests the substitution of Channel 267C2 for Channel 269A at Soperton, Georgia, and the modification of its license for Station WKTM(FM) to specify the higher powered channel. Kirby Broadcasting Company ("Kirby") requests the substitution of Channel 224C2 for Channel 224A at Dublin, Georgia, and the modification of its license for Station WKKZ(FM) to specify the higher powered channel. Kirby's proposal requires the substitution of Channel 267A for Channel 221A at Eastman, Georgia, and the substitution of Channel 265A for Channel 223A at Lyons, Georgia. Carter, Kirby, Sol, Jessup Broadcasting Limited Partnership ("Jessup"), licensee of Station WWDR, Hardeeville, South Carolina, J. Morgan Dowdy and Richard W. Rhodes ("Dowdy and Rhodes") and Thompson Radiobroadcasting Company, Inc. ("Thompson"), permittee of Station WLYU, Lyons, Georgia, filed comments. Morgan and Dowdy also filed a counterproposal requesting the allotment of Channel 267A to the communities of Unadilla and Bartow, Georgia.[2,3] Carter, Dowdy and Rhodes, Thompson, Sol, Jessup, Kirby and Fox Valley Broadcasting Corporation ("Fox Valley"), licensee of Station WQBZ(FM), filed reply comments.

2. Carter states that the allotment of Channel 267C2 to Chauncey would best serve the public interest since it would provide a first local service to the community, noting that the allotments at both Dublin and Soperton would only upgrade existing services. Carter contends that use of the channel at Chauncey would provide a second county-wide service to Dodge County and a first wide-area coverage service to a number of additional counties in south central Georgia. Further, Carter submits that the allotment would provide service to 107,668 persons within the 1 mV/m contour of Channel 267C2 at Chauncey, with 328 persons receiving a first fulltime aural service and 1,324 persons receiving a second fulltime aural service. Therefore, Carter states that the Chauncey allotment would fulfill the first three allotment priorities specified in *Revision of FM Assignment Policies and Procedures* ("*Revision*"), 90 FCC 2d 88 (1982).[4] Carter points out that Chauncey has a 1986 U.S. Census population of 350 persons and submits that it is the center of a sizeable area presently without local broadcast service. According to Carter, Chauncey is governed by an elected city council and mayor and has its own police and volunteer fire departments. Further, he states that the city provides its own water and sewer systems and elementary school. Local business activities include the Langdale Forest Products Company and Georgia Pacific Lumber Company.

3. Kirby urges the substitution of Channel 224C2 for Channel 224A at Dublin. It notes that there is no conflict between the allotment of Channel 224C2 at Dublin and either the Soperton or Chauncey requests, but rather with the choice of Channel 267A as a substitute channel for use by Station WUFF at Eastman. To resolve the conflict, Kirby proposes that Channel 291A, 248A or 272A, rather than Channel 267A, be substituted at Eastman. Kirby states that the preferred alternative, Channel 291A, can be used at Station WUFF's present site if Channel 293C2 is allotted to Fort Valley, Georgia, in lieu of proposed Channel 292C2 [MM Docket 88-221, 3 FCC Rcd 3159 (1988)], and a 7.6 kilometer southwest site restriction is imposed on the proposed allotment of Channel 291A at Sylvester, Georgia.[5] Kirby states that Channel 248A also can be allotted to Eastman at Station WUFF's present site, if Channel 229A is substituted for unoccupied but applied for Channel 248A at Jeffersonville, Georgia. Kirby notes that Channel 248A was allotted in Docket 84-231 and that none of the applied-for sites can be used if Channel 229A is substituted therefor. However, it points out that there is ample area where the applicants could specify a new transmitter site.[6] Kirby states that it is willing to join with Sol in reimbursing the applicants for the reasonable expenses incurred in amending their applications. Finally, Kirby states that Channel 272A can be allotted to Eastman with a site restriction of 8.1 kilometers south but cannot be used at Station WUFF's present transmitter site. Therefore, it believes this to be the least favorable option since Station WUFF would be required to relocate its transmitter.

4. Jessup, permittee of Station WWDR, Hardeeville, South Carolina, is an applicant seeking to modify its facilities to specify Channel 266C2 (BMPH-880610IE). It states that the Commission imposed a 30.2 kilometer southwest site restriction on the Hardeeville allotment to avoid a short-spacing to Station WALD-FM at Walterboro, South Carolina. Jessup contends that its applied-for site should be protected because the permissible site area is small and located near the Hunter Army Airfield and Savannah Municipal Airport. Jessup states that height restrictions due to FAA air traffic approach procedures to these airports necessitate a transmitter site in the northwest region of its permissible site area. It submits that the site proposed in its application is near an existing antenna farm, thus posing no hazard to air traffic while also permitting Station WWDR to provide city grade coverage to Hardeeville. Jessup notes that the allotment of Channel 267C2 to Chauncey does not conflict with its application for Channel 266C2 and thus supports the allotment as its

first local service. However, if the Commission ultimately determines that Channel 267C2 should be allotted to Soperton or that Channel 265A should be allotted to Lyons so as to allow the allotment of Channel 224C2 to Dublin, Georgia, it requests that a 7.5 kilometer west site restriction be imposed on Channel 267C2 at Soperton or a 10.7 kilometer west-northwest site restriction be imposed on Channel 265A at Lyons, to avoid a short-spacing to its pending application for Channel 266C2 at Hardeeville.

5. Kirby opposes the imposition of a site restriction on the Lyons allotment in order to protect the Jessup application. Kirby states that Jessup filed its application almost two months after the Commission entered the Lyons rule making proposal in the Commission's data base. It argues that the Kirby proposal is therefore entitled to protection from the later-filed Jessup conflicting application. Kirby goes on to state that the Dublin and Soperton proposals are compatible if a 17.3 kilometer northwest site restriction is imposed on Channel 267C2 at Soperton to protect the Lyons application coordinates. Kirby states that counsel for Sol has indicated that it does not object to a site restriction which would protect the Lyons proposal. Therefore, it requests that Channel 291A or 248A be substituted for Channel 221A at Eastman and that Kirby's upgrade to Channel 224C2 at Dublin be granted.

6. Thompson, which is now the permittee of Station WLYU at Lyons, opposes the substitution of Channel 265A for Channel 223A. It states that on October 27, 1988, after the adoption of the *Notice* herein, the Commission approved a settlement agreement whereby the sole competing application for Channel 223A at Lyons, filed by WBBT, Inc., was dismissed and Thompson's application for a construction permit granted. Thompson states that it is attempting to place the station on the air by early January 1989 and argues that a shift in its frequency would not only be burdensome and expensive, but also confusing to the listening public. However, should the Commission grant Kirby's petition, Thompson requests reimbursement for the reasonable costs associated with Station WLYU's change in frequency. It contends that such reimbursement is proper since it became a permittee during the pendency of this rule making.[7]

7. Sol reiterates its desire for the upgrade for Station WKTM(FM) at Soperton to Channel 267C2 and its intention to apply for the channel, if allotted. It opposes the allotment of Channel 267C2 to Chauncey, stating that the community has a population of only 350 persons and thus does not have a presumptive need for a local radio service, citing *Ruarch Associates*, 101 FCC 2d 1358, 58 R.R. 2d 1642 (1985). Sol argues that a Chauncey station would be economically required to serve populated areas other than its community of license since a community as small as Chauncey cannot support a radio station. It goes on to state that Chauncey presently receives more than adequate local service from the five radio stations located in the nearby communities of Eastman, Milan and McRae, Georgia. Soperton, on the other hand, has a population of 2,981 persons, more than 8-1/2 times that of Chauncey, and is also the seat of Treutlen County. Sol also contends that its Soperton proposal should be preferred over the competing request of Kirby to upgrade its Dublin station with concomitant changes at Lyons and Eastman, Georgia. It states that while Dublin is also a county seat, it already has four fulltime broadcast stations, 2 AM and 2 FM, while Soperton only receives local service from one fulltime station, Station WKTM(FM).

8. However, to permit each of the requests to be substantially granted, Sol alternatively proposes the allotment of (1) Channel 267C2 to Soperton with a site restriction west of its present location; (2) Channel 254A to Chauncey; and (3) Channel 291A or Channel 248A as a substitute for Channel 221A at Eastman and Channel 229A as a substitute for Channel 248A at Jeffersonville, Georgia. Adoption of this allotment scheme, according to Sol, will permit Chauncey to receive its first local service and Dublin and Soperton to receive upgraded service from Stations WKKZ(FM) and WKTM(FM), respectively.

9. Carter, the proponent for Chauncey, stresses that the allotment of Channel 267C2 would provide the community with its first local service, noting that Soperton receives two separate local services from Stations WKTM(FM) and WJHH(AM). He points out that the *Notice* stated that the Commission generally favors a first local service over an upgrade in facilities for an existing station. He also cites the decision in *Kingstree and McClellanville, South Carolina*, 3 FCC Rcd 1637 (1988), where the Commission allotted a Class C2 channel to the small community of McClellanville and declined to upgrade an existing station at Kingstree. As in this proceeding, the size of McClellanville but not its status as a community for allotment purposes was in question. Carter also denies any interest in the use of a Class A channel at Chauncey.

10. Sol disputes Carter's showing of first and second fulltime aural service from a Class C2 allotment at Chauncey, stating that it is premised on the use of submaximum facilities for existing stations but maximum facilities for proposed Channel 267C2 at Chauncey. When properly computed, Sol maintains that the allotment will provide no first or second fulltime aural service. Further, assuming maximum facilities for both the Soperton and Chauncey proposals, Sol claims that adoption of its proposal would serve 128,170 persons, or more than 20,000 additional persons than the Chauncey proposal. Finally, citing *Ruarch Associates*, 101 FCC 2d 1358, 58 R.R. 2d 1642 (1985), it contends that Chauncey, with its small population and limited local civic and commercial activity, is not entitled to a presumptive 307(b) preference.

11. In reply comments, Jessup again urges that any allotment to Lyons or Soperton be so site restricted as to avoid a short-spacing to the transmitter site proposed in its application for Channel 266C2 at Hardeeville, South Carolina (BMPH-880610IE).

12. Kirby contends that there is no merit to Jessup's contention that its ability to select a transmitter site which would not be short-spaced to Channel 265A at Lyons at the coordinates specified in the then pending application of Thompson is hampered by FAA concerns. Rather, Kirby notes that Jessup itself states that there are two permissible site areas, one to the west of Hardeeville, where Jessup seeks to locate its transmitter, and one to the east of Hardeeville, further removed from Lyons. Kirby states that the area east of Hardeeville, which would meet the spacing requirements to Channel 265A at Lyons, consists of undeveloped land which would be feasible for a broadcast tower. Therefore, it contends that Jessup itself has shown that there is no need for a change in the Lyons transmitter site. Further, Kirby submits that Jessup's engineering study incorrectly shows three runways instead of

two at the Savannah Municipal Airport. When correctly depicted, Kirby states that the southwest-northeast airspace protection zone would be eliminated, thus more than tripling the permissible site area beyond what Jessup itself concedes. Additionally, Kirby again argues that Jessup was on notice that any application which it might file needed to protect the prior filed Kirby petition seeking the allotment of Channel 265A to Lyons at the transmitter site specified by Thompson. Finally, it argues that the coordinates specified in Thompson's application no longer can be considered as only a site preference since Thompson has now received a construction permit and begun construction. The coordinates specified by Jessup, however, must remain only a preference since its application has not been granted. Therefore, it argues that equity favors protection of Thompson's actual site.

13. Kirby argues that Thompson's objections to the channel change for its Lyons station are without merit. It states that it is well-established that no licensee or permittee has a property right to any particular channel and that stations are routinely required to change frequency. Further, it contends that Thompson's station is being built with actual knowledge that it might be required to change its channel of operation. However, it states that it is willing to reimburse Thompson for the reasonable costs associated with its change of channel, with the exception of costs associated with the purchase, installation and promotion of facilities for Channel 223, since Thompson knew that such facilities were subject to change depending on the decision in this proceeding. Finally, Kirby again requests that Channel 291A or Channel 248A be substituted for Channel 221A at Eastman. Kirby reiterates that it will reimburse WUFF for the cost of relocating its tower and changing channels if Channel 291A is allotted to Eastman or join with Sol in reimbursing the Jeffersonville applicants if Channel 248A is ultimately allotted to Eastman and Channel 267C2 is allotted to Soperton.

14. Fox Valley states that Kirby's proposal to substitute either Channel 291A or Channel 272A for Channel 221A at Eastman are fatally flawed. Channel 291A can be allotted to Eastman only if Fox Valley's Station WQBZ(FM) at Fort Valley, Georgia, is modified to specify operation on Channel 293C2 in lieu of Channel 292C2, as proposed in MM Docket 88-221. *See* 3 FCC Rcd 3159 (1988). However, Fox Valley states that it did not request Channel 293C2 and no timely proposal for such a channel change was filed. It goes on to submit that Kirby's proposal for Channel 293C2 at Fort Valley must be considered as a late-filed counterproposal in MM Docket 88-221 and thus rejected. Further, it states that Fox Valley would not accept such a channel change since it would require the station to move its transmitter site to an area which would make the upgrade economically worthless. Likewise, Fox Valley states that Channel 272A at Eastman would require Station WUFF to change its transmitter site. However, it believes that Channel 248A can be allotted to Eastman even though it would require three applicants to amend their applications for Channel 248A at Jeffersonville, Georgia, to specify Channel 229A. It states that the Commission has required such applicants to change sites, even though it was to accommodate a first new service, citing *Freedom and Morgan Hill, California*, 2 FCC Rcd 2182, 2183 (1987), *recons. denied*.

DISCUSSION

15. In an effort to resolve the conflicting requests, the staff has performed a channel search for each of the communities involved. Our study shows that there is no alternate co-channel available as an upgrade for Soperton or alternate Class C2 allotment for Chauncey. We have confirmed, however, that the proposal of Kirby to substitute Channel 224C2 for Channel 224A at Dublin, by changing channels at Eastman, Jeffersonville and Lyons, Georgia, resolves the conflict with the Soperton proposal. Therefore, the remaining requests which need to be comparatively considered are those of Sol to substitute Channel 267C2 for Channel 269A at Soperton, Georgia, and Carter to allot Channel 267C2 to Chauncey, Georgia, as its first local FM service.

16. Our actions are guided by the allotment priorities set forth in *Revision, supra*, as follows:

(1) First fulltime aural service

(2) Second fulltime aural service

(3) First local service

(4) Other public interest matters

(Co-equal weight is given to priorities (2) and (3))

The allotment of Channel 267C2 to Chauncey fulfills the third priority by providing the community with its first local FM service. Carter claims that adoption of his proposal would also further the first and second priorities by providing first and second fulltime aural service to persons residing within the 1 mV/m contour of the Channel 267C2 Chauncey station. Sol argues that Carter's showing was based on incorrect assumptions and that no first or second aural service could be shown if the study is based on correct assumptions. We have evaluated Carter's study and agree with Sol that the allotment of Channel 267C2 to Chauncey will not provide any first fulltime aural service. However, the staff study does confirm that 450 persons would receive a second fulltime aural service. Sol considered all FM allotments to be operating at maximum facilities. However, the FCC mandated methodology is to consider Class C allotments at actual or minimum facilities, whichever is greater. *See Greenup, Kentucky*, 2 FCC Rcd 4319 (1987). Thus, Class C Station WDMG in Douglas, Georgia, is credited with actual facilities of 310 meters, 100 kilowatts. Using the actual facilities of Station WDMG reveals that the Chauncey station would provide a first FM service to an area entirely within Wilcox County, Georgia (population 7,682). Although fulltime AM Station WMAZ, Macon, Georgia, provides service to most of this population, approximately 450 persons do not receive service from the Macon station.

17. The provision of a competitive service to a larger community may overcome the presumptive need for a first local service to a smaller community, especially if the public interest benefit arising from the allotment of a channel to the smaller community is limited to the provision of first local service to an extremely small population. *See, Ruarch Associates, supra., New South Broadcasting Corporation v. FCC*, D.C. Cir. Case No. 87-1303, decided July 7, 1989. However, this is not the case in this proceeding. First, the allotment of Channel 267C2 to Chauncey provides a first local and second fulltime service to approximately 800 persons. Secondly, it

does not deny a competitive service to the larger community of Soperton, only the expansion of an existing one. Further, while Chauncey is a small community, we find that it does not qualify as a "quiet village." Chauncey, although small in population, is self-governing, providing its residents with municipal services such as police and fire protection, water and sewer service, schools and employment. Based on Carter's pleadings, we believe that Chauncey has needs unique to the community which could be served by a local radio service. Further, since the two communities are located approximately 55 kilometers apart, Chauncey could not expect to receive service from a Soperton Channel 267C2 station. We find that Sol has not made a sufficiently compelling showing that Soperton or its environs has broadcast needs which are not being met by the current operation of Station WKTM(FM) on Channel 269A or other area stations. Therefore, based upon the above discussion, we find that the allotment of Channel 267C2 to Chauncey, with its ability to provide a second fulltime aural service and first local service to a combined total of at least 800 persons serves a higher allotment priority, and, therefore, better serves the public interest than would the allotment of Channel 267C2 at Soperton to enable Station WKTM(FM) to increase its coverage area. Further, we find that Sol's argument that Chauncey already receives adequate service from nearby stations to be unpersuasive in this case. As the Commission has long held, reception service from nearby stations is not a substitute for local service. *See Clinton, Louisiana*, 45 R.R. 2d 1587 (1979) and *Westover and Grafton, West Virginia*, 46 FR 10737 (1981). Finally, we will not allot Channel 254A to Chauncey, as suggested by Sol, since no interest in its use has been expressed and because a Class A channel would not provide the benefit of second aural service.

18. We also find that the public interest would be served by substituting Channel 224C2 for Channel 224A at Dublin, Georgia, with concomitant changes at Eastman, Jeffersonville and Lyons, Georgia. Thompson objects to the substitution of Channel 265A for Channel 223A at Lyons and the modification of its construction permit for Station WLYU, stating that the change would be burdensome and expensive to it and confusing to the public. However, we find that these arguments do not raise a substantial and material question of fact which would warrant a hearing. Channel 265A can be used at the site specified in Station WLYU's outstanding construction permit and thus requires no change beyond its channel of operation. Further, the Commission has held on numerous occasions that the substitution of channels at one location to enable the provision of new or expanded service elsewhere serves the public interest. *See Onawa, Iowa and Vermillion, South Dakota*, 4 FCC Rcd 703 (1989) and cases cited therein. Finally, the Commission served Thompson with a copy of the *Notice* in this proceeding and conditioned the grant of Station WLYU's construction permit on the outcome of this proceeding. Thus, Thompson was put on notice that the Commission was actively considering changing the channel in Lyons and therefore constructed the station and went on the air at its own risk, knowing that its channel of operation was subject to change. Based on this record, we do not find that it is entitled to reimbursement even though it became a permittee during the pendency of this proceeding. *See Bayou Vista and Franklin, Louisiana*, 34 RR 2d 1540 (1975). We will not impose the site restriction requested by Jessup so as to avoid a conflict with the transmitter site specified in its application for Channel 266C2 at Hardeeville. We find that Jessup has not made a sufficiently compelling showing that the site specified in its application is anything more than a preference. While its choice of transmitter sites may be limited due to the existence of the Hunter Army Airfield and Savannah Municipal Airport, Jessup failed to show that there are no other sites from which it can provide Hardeeville with the required 70 dBu city grade coverage which will also meet the mileage separation requirements to Channel 265A at Lyons.[8]

19. WUFF Radio, licensee of Station WUFF(FM) in Eastman, did not respond to the *Order to Show Cause* as to why its license should not be modified to specify the alternate Class A channel. Therefore, it is deemed to have consented to the modification. WUFF Radio, of course, is entitled to reimbursement from Kirby for the reasonable expenses involved in the change of its channel.

20. Therefore, for the reasons set forth above, we believe the public interest would be served by allotting Channel 267C2 to Chauncey, Georgia, as its first local FM service. In addition, we will substitute Channel 224C2 for Channel 224A at Dublin, Georgia, in order to upgrade the operation of Station WKKZ(FM), by substituting Channel 248A for Channel 221A at Eastman, Georgia, Channel 229A for Channel 248A at Jeffersonville, Georgia, and substituting Channel 265A for Channel 223A at Lyons, Georgia. With the allotment of Channel 267C2 to Chauncey, we are denying the allotment of Channel 267C2 to Soperton as an upgraded channel for Station WKTM(FM).

21. Channel 267C2 can be allotted to Chauncey in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.4 kilometers north. Channel 224C2 can be allotted to Dublin and can be used at Station WKKZ(FM)'s present transmitter site. Channel 248A can be allotted to Eastman and can be used at the present transmitter site of Station WUFF(FM). Channel 265A can be allotted to Lyons and can be used at the present transmitter site of Station WLYU. Channel 229A can be allotted to Jeffersonville with a site restriction of 5.8 kilometers (3.6 miles) southwest.[9]

22. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 3, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Chauncey, Georgia	267C2
Dublin, Georgia	224C2, 240C2
Eastman, Georgia	248A
Jeffersonville, Georgia	229A
Lyons, Georgia	265A

23. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of WUFF Radio for Station WUFF(FM), Eastman, Georgia, IS MODIFIED to specify operation on Channel 248A in lieu of Channel 221A, and the permit of Thompson Radio Broadcasting Company, Inc. for Sta-

tion WLYU, Lyons, Georgia, IS MODIFIED to specify operation on Channel 265A in lieu of Channel 223A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WUFF's license, BLH-7583, or Station WLYU's construction permit, BPH-871120MA, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

24. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Kirby Broadcasting Company for Station WKKZ(FM), Dublin, Georgia, IS MODIFIED to specify operation on Channel 224C2, in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

25. IT IS FURTHER ORDERED, That the Secretary shall send BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Report and Order* to the licensee of Station WUFF(FM), the permittee of Station WLYU, and the applicants for Channel 248A at Jeffersonville, Georgia, as follows: WUFF Radio, c/o Gene Rogers, President, Box 626, Eastman, Georgia 31023; Thompson Radio Broadcasting Co., Inc., P.O. Box 111, Lyons, Georgia 30436; A.L.P. Limited Partnership, 503 Magnolia Street, Jeffersonville, Georgia 31044; Stehle Broadcasting, Inc., Route 1, Box 211, Parker Road, Dry Branch, Georgia 32020; and Joseph Lark Kitchens, P.O. Box 515, Jeffersonville, Georgia 31044.

26. The window period for filing applications for Channel 267C2 at Chauncey, Georgia, will open on **November 6, 1989,** and close on **December 6, 1989.**

27. IT IS FURTHER ORDERED, That the petition of Sol Broadcasting, Inc. to substitute Channel 267C2 for Channel 269A at Soperton, Georgia, IS DENIED.

28. IT IS FURTHER ORDERED, That the counterproposal of J. Morgan Dowdy and Richard W. Rhodes to allot Channel 267A to Bartow and Unadilla, Georgia, IS DISMISSED.

29. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

30. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Bartow, Jeffersonville and Unadilla have been added to the caption.

[2] Public Notice of the counterproposal was given on December 7, 1988, Report No. 1761.

[3] On August 2, 1989, Dowdy and Rhodes withdrew their requests for allotments to Unadilla and Bartow. No other party expressed an interest in applying for use of a channel at either community. Therefore, we will dismiss their counterproposal and all comments responsive thereto will not be discussed.

[4] The priorities set forth in *Revision, supra*, are: (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local service; and (4) Other public interest matter. Coequal weight is given to priorities (2) and (3).

[5] Channel 291A was allotted to Sylvester with a site restriction of 9.1 kilometers southwest. *See*, 4 FCC Rcd 845 (1989).

[6] In supplemental comments, Kirby furnishes an agreement with two of the three applicants whereby they agree to amend their applications to specify new transmitter sites if Channel 248A is allotted to Jeffersonville.

[7] Thompson's construction permit was specifically conditioned upon the outcome of the Dublin proposal in RM-6338.

[8] Although Jessup is required by this *Report and Order* to amend its application, we note that Jessup has already done so by amendment dated July 19, 1989.

[9] The coordinates for Channel 267C2 at Chauncey are North Latitude 32-16-03 and West Longitude 83-06-26. The coordinates for Channel 224C2 at Dublin are North Latitude 32-31-21 and West Longitude 82-54-00. The coordinates for Channel 248A at Eastman are North Latitude 32-13-35 and West Longitude 83-13-10. The coordinates for Channel 229A at Jeffersonville are North Latitude 32-39-28 and West Longitude 83-22-55. The coordinates for Channel 265A at Lyons are North Latitude 32-06-48 and West Longitude 82-23-52.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-464

In the Matter of

Amendment of Section 73.202(b), RM-6331
Table of Allotments,
FM Broadcast Stations.
(Wray, Colorado)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 28, 1989; Released: September 18, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 3 FCC Rcd 5766 (1988), issued in response to a petition filed on behalf of Wray Radio, Inc. (petitioner), licensee of Station KATR-FM,[1], Channel 252A, Wray, Colorado, proposing the substitution of Channel 252C2 for Channel 252A and modification of its license to specify operation on the higher-powered channel. Petitioner filed comments in support of the proposal. No other comments were received.

2. As indicated in the *Notice*, Channel 252C2 can be allotted to Wray, Colorado, at the petitioner's existing site,[2] consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. In view of the above, we believe the public interest would be served by substituting Channel 252C2 for Channel 252A at Wray, Colorado, since it could provide a first expanded coverage FM service to the community. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Wray Radio, Inc. to specify operation on Channel 252C2 in lieu of Channel 252A, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 3, 1989**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Wray, Colorado	252C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to Wray Radio, Inc., for Station KATR-FM, IS MODIFIED effective **November 3, 1989**, to specify operation on Channel 252C2 in lieu of Channel 252A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Formerly Station KRDZ-FM.

[2] Coordinates at the licensed site of Station KATR-FM are 40-04-56 and 102-11-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-71

In the Matter of

Amendment of Section 73.202(b), RM-6509
Table of Allotments,
FM Broadcast Stations.
(East Porterville, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 28, 1989; Released: September 18, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 2525 (1989), issued in response to a petition filed on behalf of Central California Broadcasting (petitioner), permittee of Station KPOR-FM, Channel 263A, East Porterville, California (BPH-880226MK), proposing the substitution of Channel 263B1 for Channel 263A and modification of its construction permit to specify operation on the higher-powered channel. Petitioner filed comments in support of the proposal. No other comments were received.

2. As indicated in the *Notice*, Channel 263B1 can be allotted to East Porterville, California, at the petitioner's specified site,[1] consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. In view of the above, we believe the public interest would be served by substituting Channel 263B1 for Channel 263A at East Porterville, since it could provide the first expanded coverage FM service to the community. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the permit of Central California Broadcasting to specify operation on Channel 263B1 in lieu of Channel 263A, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 3, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
East Porterville, California	263B1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit issued to Central California Broadcasting at East Porterville, California, IS MODIFIED effective **November 3, 1989,** to specify operation on Channel 263B1 in lieu of Channel 263A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates at the petitioner's specified site for Channel 263B1 at East Porterville are 35-53-00 and 118-56-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-451

In the Matter of

Amendment of Section 73.202(b),	RM-6352
Table of Allotments,	
FM Broadcast Stations.	
(Ludlow, California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 28, 1989; Released: September 18, 1989

By the Chief, Allocations Branch:

1. Pursuant to the request of Rick L. Murphy (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 5699 (1988), proposing the allotment of Channel 289A to Ludlow, California, as that community's first local broadcast service. Petitioner filed comments reaffirming an intention to apply for the channel, if allotted.

2. A staff engineering analysis indicates that Channel 289A can be allotted to Ludlow, California, consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[1]

3. Since Ludlow, California, is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government is required.

4. The *Notice* requested the petitioner to provide sufficient information to demonstrate that Ludlow has social, economic or cultural indicia to qualify it as a "community" for allotment purposes, since it is not listed in the U.S. Census. *See Ansley, Alabama*, 46 FR 58688 (1981); *Cascade Village, Colorado*, 48 FR 19917 (1983); *Ellwood, California*, 50 FR 13031 (1985). In response, the petitioner asserts that Ludlow has a postal service with its own assigned zip code of 92338, as well as the Ludlow Motel and the Ludlow Airport, a bus station, railroad station, a grocery store, a cafe and coffee shop, and three gasoline stations.

5. Based on the information submitted by the petitioner, we believe it is sufficient to establish that Ludlow qualifies as a community for allotment purposes. We believe the public interest would be served by the allotment of Channel 289A to Ludlow, California, as that community's first local broadcast service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 3, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Ludlow, California	289A

6. The window period for filing applications for Channel 289A at Ludlow, California, will open on **November 6, 1989,** and close on **December 6, 1989.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Ordee D. Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates used for Channel 289A, Ludlow, California, are 34-43-24 and 116-09-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-69

In the Matter of

Amendment of Section 73.202(b), RM-6303
Table of Allotments,
FM Broadcast Stations.
(Tell City, Indiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 28, 1989; Released: September 18, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 2521 (1989), proposing the allotment of Channel 245A to Tell City, Indiana, as that community's first local broadcast service. Additionally, Tell City Radio Company (TCRC) filed a separate petition requesting the same channel allotment to Tell City. Thus, we will treat TCRC's petition as comments in support. Both parties have indicated their intention to apply for the channel if allotted.

2. A staff engineering analysis has determined that Channel 245A can be allotted to Tell City, Indiana, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 7.0 kilometers (4.3 miles) northeast to negate a short-spacing to Station WDDJ (FM), Channel 245Cl, Paducah, Kentucky.[1]

3. We believe the public interest would be served by allotting Channel 245A to Tell City, Indiana, since it could provide that community with its first local broadcast service.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 3, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Tell City, Indiana	245A

5. The window period for filing applications for Channel 245A, Tell City, Indiana, will open on **November 6, 1989,** and close on **December 6, 1989.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Ordee Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates for Channel 245A are 38-00-10 and 86-43-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-382

In re Applications of

WWOR-TV, INC File No. BRCT-871221KE

For Renewal of License of Station
WWOR(TV), Secaucus, New Jersey

and

GARDEN STATE BROADCASTING, LIMITED PARTNERSHIP File No. BPCT-871223KG

For Construction Permit
Secaucus, New Jersey

ORDER

Adopted: September 7, 1989; Released: September 18, 1989

By the Commission:

1. Before the Commission are: (a) a Motion for Extraordinary Review filed March 30, 1989 by Garden State Broadcasting Limited Partnership (Garden State); (b) an Opposition to that motion filed April 6, 1989 by WWOR-TV, Inc.; (c) a Motion for Stay filed March 30, 1989 by Garden State; and (d) an Opposition thereto filed April 6, 1989 by WWOR-TV, Inc. These pleadings relate to a *Memorandum Opinion and Order*, 4 FCC Rcd 2551 (1989), of the Review Board which upheld an interlocutory ruling by the Administrative Law Judge in this proceeding. WWOR-TV, Inc., FCC 89M-603, released Feb. 22, 1989. That prehearing discovery ruling rejected Garden State's work-product claims and required it to produce documents supporting the proposed testimony of its expert witness, Dr. Roger N. Johnson. Garden State argues that this discovery ruling was inappropriate in light of the procedure established for the exchange of the parties' direct written testimony. However, the direct written testimony procedure, to which Garden State voluntarily agreed in this case, is merely one facet of the Commission's efforts to expedite evidentiary hearings. Garden State has made no showing either that it was intended to or that it should be used to the exclusion of other prehearing procedures, which are also designed to expedite the overall hearing process.

2. ACCORDINGLY, IT IS ORDERED that, pursuant to 47 C.F.R. § 1.115(g), the Motion for Extraordinary Review filed by Garden State IS DENIED and the accompanying Motion for Stay IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-388

In re Applications of

WINFAS OF FAYETTEVILLE, INC. (hereafter "Winfas")	File No. BPH-870819MF
DR. JAMES E. CARSON (hereafter "Carson")	File No. BPH-870819MJ
JOHN GILMER DAWSON d/b/a GENESIS COMMUNICATIONS (hereafter "Genesis")	File No. BPH-870819ML

For Construction Permit
for a New FM Station
in Hope Mills, North Carolina
Channel 283A (104.5MHz)[1]

HEARING DESIGNATION ORDER

Adopted: August 25, 1989; Released: September 19, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Winfas*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Winfas has not completed Item 4 correctly. Winfas' application gives only the city of residence for five of the principals and a post office box number as the residence address for Andrew Thomas Walker. Accordingly, Winfas must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

3. *Carson*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Carson has filed such statement, it is deficient because he fails to list any specific recruitment sources he proposes to use to attract qualified minority and female job applicants. Accordingly, Carson will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

4. *Genesis*. John G. Dawson, owner of Genesis, is the general manager of and a shareholder in the licensee of WFNC and WQSM(FM), Fayetteville, North Carolina. Our study confirms that Genesis' proposed principal city (3.16 mV/m) contour would cause prohibited overlap with that of WQSM(FM). Mr. Dawson has indicated his intent to terminate his relationship with both WFNC and WQSM(FM) in the event of grant of the referenced application. Accordingly, in the event of grant of Genesis' application, Mr. Dawson will be required to sever all connections with WFNC and WQSM(FM) prior to the commencement of program test authority.

5. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Genesis would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. *Other matters*. All three applicants petitioned for leave to amend their applications. The accompanying amendments were filed after October 5, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the following amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENT(S) FILED
Winfas	April 27, 1989 (engr.); June 9, 1989; and August 1, 1989
Carson	June 16, 1989
Genesis	June 7, 1988 (engr.); July 6, 1988; and May 30, 1989 (engr.)

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Genesis would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That Winfas shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

11. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Carson shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

12. IT IS FURTHER ORDERED, That, in the event of grant of Genesis' application, John G. Dawson will be ordered to divest himself of all interests in and sever all connections with Stations WFNC and WQSM(FM), Fayetteville, North Carolina, prior to the commencement of program test authority.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

14. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Pursuant to the *Report and Order* in MM Docket No. 88-200, released March 13, 1989, Channel 283A was substituted for Channel 278A at Hope Mills, North Carolina. Thereafter, all three above-captioned applicants amended their applications to reflect the new channel.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-398

In the Matter of

Amendment of Section 73.202(b), RM-6819
Table of Allotments,
FM Broadcast Stations.
(Spring City, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 23, 1989; Released: September 19, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Walter E. Hooper, III. (petitioner), requesting the substitution of Channel 230C3 for Channel 230A at Spring City, Tennessee, and the modification of his construction permit for Station WAYA(FM) at Spring City to specify operation on the higher class co-channel. The proposal could provide the community with its first expanded FM service. Petitioner states he will promptly construct the improved facilities, if permitted.

2. Channel 230C3 can be allotted to Spring City in compliance with the Commission's minimum distance separation requirements with a site restriction. Petitioner specified a site 21.1 kilometers (13.1 miles) southeast of the city.[1]

3. We shall propose to modify the construction permit for Station WAYA(FM) to specify operation on the higher class co-channel, Channel 230C3, as requested. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Spring City.

4. In view of the fact that Spring City, Tennessee, could receive its first wide coverage area FM station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Spring City, Tennessee	230A	230C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 13, 1989,** and reply comments on or before **November 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Timothy K. Brady, Esquire
P.O. Box 986
Brentwood, TN 37027-0986
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

[1] The

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The restricted site coordinates are 35-33-06 and 84-42-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-399

In the Matter of

Amendment of Section 73.202(b), RM-6807
Table of Allotments,
FM Broadcast Stations.
(Columbia, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 24, 1989; Released: September 19, 1989

By the Chief, Allocations Branch:

1. At the request of Tom Gay, d/b/a The Radio Group (petitioner), the Commission has before it for consideration a petition for rule making requesting the substitution of Channel 276C3 for Channel 276A at Columbia, Louisiana, and the modification of its license for Station KCTO-FM at Columbia to specify operation on the higher class co-channel. The proposal could provide Columbia with its first expanded FM service. Petitioner states that it will apply for Channel 276C3, if allotted.

2. Channel 276C3 can be substituted for Channel 276A at Columbia in compliance with the Commission's minimum distance separation requirements at the site specified by the petitioner, a site located 18.5 kilometers (11.5 miles) west of the city.[1] Accordingly, as requested, we shall propose to modify Station KCTO-FM's license for Channel 276A at Columbia to specify operation on Channel 276C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Columbia.

3. In view of the fact that Columbia, Louisiana, could receive its first wide coverage area FM station, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Columbia, Louisiana	276A	276C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 13, 1989,** and reply comments on or before **November 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

James J. Popham, Esquire
700 Camp Street
New Orleans, LA 70130
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 32-02-00 and 92-15-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-400

In the Matter of

Amendment of Section 73.202(b), RM-6808
Table of Allotments,
FM Broadcast Stations.
(Georgetown, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 24, 1989; Released: September 19, 1989

By the Chief, Allocations Branch:

1. Williamson County Communications, Inc. (petitioner), has filed a petition for rule making requesting the substitution of Channel 299C3 for Channel 299A at Georgetown, Texas, and the modification of its construction permit for Channel 299A to specify operation on the higher powered channel. The proposal could provide the community with its second expanded FM service. Petitioner states its intention to construct the improved station, if the higher class channel is allotted.

2. Channel 299C3 can be allotted to Georgetown in compliance with the Commission's minimum distance separation requirements utilizing the petitioner's specified site, which is 18.9 kilometers (11.7 miles) northeast of the city.[1] As requested, we shall propose to modify the construction permit for Channel 299A at Georgetown to specify operation on the higher class co-channel, Channel 299C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Georgetown.

3. In view of the fact that Georgetown, Texas, could receive its second wide coverage area FM station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Georgetown, Texas	244C1, 299A	244C1, 299C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 13, 1989,** and reply comments on or before **November 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Merilyn M. Strailman, Esquire
Jones, Waldo, Holbrook & McDonough
1001 22nd Street, N.W.
Suite 350
Washington, D.C. 20037
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 30-43-08 and 97-30-24. We note that the proposal is short-spaced to vacant but applied for Channel 297A at Nolanville, Texas. However, the proposal complies with the Commission's minimum distance separation requirements to all of the pending applications for Channel 297A.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-401

In the Matter of

Amendment of Section 73.202(b), RM-6854
Table of Allotments,
FM Broadcast Stations.
(Merrill, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 24, 1989; Released: September 19, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Roberts Broadcasting, Inc. (petitioner), requesting the substitution of Channel 281C3 for Channel 281A at Merrill, Wisconsin, and the modification of its license for Station WMZK-FM at Merrill to specify operation on the higher class co-channel. The proposal could provide the community with its first expanded FM service. Petitioner states it will apply for the channel, if allotted.

2. Channel 281C3 can be allotted to Merrill in compliance with the Commission's minimum distance separation requirements at Station WMZK-FM's current transmitter site.[1] Since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government must be obtained for the proposal.

3. As requested, we shall propose to modify the license of Station WMZK-FM to specify operation on the higher class co-channel, Channel 281C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Merrill.

4. We believe the public interest could be served by the proposed substitution of Channel 281C3 for Channel 281A at Merrill, Wisconsin. Accordingly, in order to provide Merrill with a first expanded FM service, the Commission seeks comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Merrill, Wisconsin	281A	281C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 13, 1989,** and reply comments on or before **November 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Michael L. Glaser, Esquire
Joseph P. Benkert, Esquire
Gardner, Carton & Douglas
370 17th Street
Suite 2200
Denver, Colorado 80202
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The transmitter site is located 3.7 kilometers (2.3 miles) southeast of the city. The coordinates are 45-10-45 and 89-38-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-402

In the Matter of

Amendment of Section 73.202(b), RM-6903
Table of Allotments,
FM Broadcast Stations.
(Virginia City, Nevada)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 24, 1989; Released: September 19, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Denise Neubauer (petitioner) requesting the allotment of Channel 273C3 to Virginia City, Nevada, as the community's first local FM service. Petitioner states that she will apply for the channel, if allotted. Channel 273C3 can be allotted to Virginia City in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.9 kilometers (12.4 miles) northeast to avoid a short-spacing to Stations KSFM, Channel 273B, Woodland, California, and KTHO-FM, Channel 275C2, South Lake Tahoe, California.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 273C3 to Virginia City, Nevada, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Virginia City, Nevada	–	273C3

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **November 13, 1989,** and reply comments on or before **November 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Denise Neubauer	Larry G. Fuss
1078 South Gale Road	P.O. Box 159
Davison, Michigan 48423	Fayetteville, Georgia 30214
(Petitioner)	(Consultant to petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 39-28-06 and West Longitude 119-31-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-403

In the Matter of

Amendment of Section 73.202(b),	RM-6902
Table of Allotments,	
FM Broadcast Stations.	
(Asbury, Iowa)	

NOTICE OF PROPOSED RULE MAKING

Adopted: August 24, 1989; Released: September 19, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Denise Neubauer (petitioner) requesting the allotment of Channel 277C3 to Asbury, Iowa, as its first local FM service. Petitioner states that she will apply for the channel, if allotted. Channel 277C3 can be allotted to Asbury in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.9 kilometers (12.4 miles) northeast to avoid a short-spacing to Channel 277C1 at Pella, Iowa, which is reserved for Station KDMG-FM.[1]

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies ". . .among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Asbury is not listed in the U.S. Census.[2] Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Asbury is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Ansley, Alabama*, 46 Fed. Reg. 58688, published December 3, 1983, *Cascade Village, Colorado*, 48 FR 19917 (1983) and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

3. We believe the public interest would be served by seeking further information on the allotment of Channel 277C3 to Asbury, Iowa, if it is ultimately found to be a community for allotment purposes. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Asbury, Iowa		277C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 13, 1989,** and reply comments on or before **November 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Denise Neubauer	Larry G. Fuss
1078 South Gale Road	P.O. Box 159
Davison, Michigan 48423	Fayetteville, Georgia 30214
(Petitioner)	(Consultant to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for this allotment are North Latitude 42-35-04 and West Longitude 90-31-43. If Station KDMG-FM's pending application (BPH-881021IC) is granted, a site restriction of 6.7 kilometers (4.2 miles) northwest will be needed.

[2] We note that Asbury is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 410. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi*, 48 FR 5974 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN SATELLITE COMPANY d/b/a CONTEL ASC
Transferor

File No. I-T-C-89-118-TC

and

IDB COMMUNICATIONS GROUP, INC.
Transferee

Application for authority to
Transfer Control of CICI, Inc.
d/b/a Contel ASC

AMERICAN SATELLITE COMPANY d/b/a CONTEL ASC
Assignor

File No. CSG-89-099-(8)-AL

and

IDB COMMUNICATIONS GROUP, INC.
Assignee

Application for authority to assign
International Earth Station Licenses

MEMORANDUM OPINION AND ORDER

Adopted: September 12, 1989 Released: September 20, 1989

By the Chief, International Facilities Division:

1. On June 9, 1989, the above-captioned applications were filed for consent to Transfer Control of CICI, Inc. d/b/a Contel ASC (CICI) from American Satellite Company d/b/a Contel ASC (Contel ASC) to IDB Communications Group, Inc. (IDB) and for consent to the assignment of eight international earth station licenses from Contel ASC to IDB.[1] The applications were placed on public notice on June 21, 1989. Comments were filed by MCI Communications Corporation (MCI).

2. CICI is a Delaware corporation and a wholly-owned subsidiary of Contel ASC. CICI offers a wide variety of international service offerings including International Business Services (IBS) and International Television Services. CICI provides service through its own ground segment facilities, as well as through earth stations licensed to Contel ASC. In addition, CICI also offers international services through its wholly-owned subsidiary, CICIIBS, Inc., which has a 50% interest in International Business Earth Stations (IBES).

3. Contel ASC is a Delaware Corporation and a subsidiary of Contel Corporation. Contel ASC offers a wide variety of domestic and international voice, data, and video telecommunications services to the public including VSAT services.

4. IDB, an existing Commission licensee, provides domestic and international satellite transmission and distribution services for radio and television programming and data and voice communications through an extensive network of IDB owned and operated fixed and transportable satellite communications facilities. For example, radio networks utilize IDB's transmission services for the distribution of regular network programming and special events. IDB's data/voice transmission services are used by companies for facsimile publishing, data distribution, and compressed video networks. In addition, IDB operates teleport facilities in Los Angeles and New York, fixed earth stations in many major metropolitan areas, and a fleet of transportable earth stations.

5. The proposed transaction contemplates the acquisition by IDB of 100% of the issued and outstanding shares of CICI from Contel ASC. Upon consummation of the agreement, CICI, which is now a wholly-owned subsidiary of Contel ASC, will be a wholly-owned subsidiary of IDB. In addition, IDB will acquire certain international earth station facilities that are licensed to Contel ASC, but used by CICI in support of its business.

6. We will first address the comments of MCI in this matter. MCI states it filed the comments only to ensure that the record in this matter provide reference to any interested party that there are presently pending before the Commission enforcement proceedings concerning MCI and Contel ASC, File Nos. E-89-135, 138 and 139. Since the comments are part of this record, no further action in this regard is necessary.

7. We find that the proposed transfer of control and the assignment as detailed in the applications will not entail substantial changes in CICI's structure or service. CICI's customers will not be affected by the transactions since service will not be discontinued and no changes are planned for CICI's operation. IDB is a Commission licensee and has experience in international telecommunications. IDB contends the combined resources of IDB and CICI will enable both companies to offer new and innovative services; as well as expand existing services. Also, IDB suggests that anticipated efficiencies of scale will lower the operating costs of both companies, allowing them to offer competitive rates.

8. We must also address the issue of whether the proposed transaction will inhibit competition and thereby be detrimental to the public interest. Section 7 of the Clayton Act proscribes the acquisition of stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[2] Under Section 11 of that statute, the Commission is impowered to enforce Section 7 in the case of "common carriers engaged in wire or radio communications or radio transmissions of energy."[3] The courts have construed this to mean the requirements of Section 11 of the Clayton Act and the applicable provisions of the

Communications Act" are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[4] In brief, we are required to consider anti-competitive consequences as one factor in our public interest consideration. In the present instance, both Contel ASC and IDB are non-dominant carriers and there is no basis to conclude that the proposed transactions would adversely impact the marketplace.

9. In view of the foregoing, we find the public convenience and necessity will be served by approving the above-captioned applications for transfer of control and assignment of CICI to IDB.

10. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-89-118-TC and CSG-89-099-(8)-(AL) for transfer of control and assignment of CICI/Contel ASC to IDB Communications Group, Inc. ARE GRANTED.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applicants for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] On August 21, 1989, we requested the Department of State's comments as to the transfer of control of CICI's TAT-9 cable landing license. The Department of State on August 31, stated that it had no objection to the proposed transfer.

[2] 15 U.S.C. §18.

[3] 15 U.S.C. §21.

[4] United States v. FCC 652 F.2d, 77, 88 (D.C. Cir. 1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SAMOA TECHNOLOGIES, INC. File No. I-T-C-89-123

Application for Authority to Acquire and Operate the Interests of Comsat Earth Stations, Inc. in the Tutuila, American Samoa International Earth Station

COMSAT EARTH STATIONS, INC. File No. CSG-89-101-TC/AL

Application for consent to assignment of radio station construction permit or license

MEMORANDUM OPINION, ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 12, 1989 Released: September 20, 1989

By the Chief, International Facilities Division:

I. INTRODUCTION

1. On June 16, 1989 Samoa Technologies, Inc. (STI) filed an application, pursuant to Titles II and III of the Communications Act, as amended, to operate existing INTELSAT channels of satellite communication through the existing Tutuila international multi-purpose earth station at Pago Pago, American Samoa and to acquire the Tutuila earth station from Comsat Earth Stations, Inc. (Comsat-CES). Comsat-CES concurrently filed an application for consent to assignment of the Tutuila radio license to STI. The applications are unopposed. For the reasons stated below, we grant the applications.

II. BACKGROUND

2. American Samoa is an unincorporated territorial possession of the United States. It is located in the southern Pacific Ocean 2,300 miles southwest of Hawaii and 1,600 miles northeast of New Zealand. The Comsat-CES multi-purpose earth station is on the main island of Tutuila at Pago Pago, capital of the territory of American Samoa. It provides channels of satellite communications between American Samoa and the U.S. mainland, Hawaii, Fiji, Korea, Republic of the Marshall Islands, Federated States of Micronesia, Palau, Taiwan and New Zealand. In authorizing Comsat to construct the facility in 1979, the Commission determined that the operation of the earth station would serve the public interest, convenience and necessity through the provision of communications satellite facilities to meet the communications needs of American Samoa.[1] Prior to the station's construction, American Samoa used high frequency radio circuits for the provision of its overseas telecommunications services. These circuits were inadequate to meet the grade and quality of service objectives established by the Government of American Samoa.

III. DISCUSSION

3. In its instant application, STI seeks the requisite Commission authority to acquire the Tutuila earth station from Comsat-CES and operate the existing channels of satellite communications on a common carrier basis.[2] We find that STI's acquisition and operation of the facility will serve the public interest. STI has shown that it has the requisite legal, financial and technical qualifications to provide international common carrier service from the territory of American Samoa to overseas points. STI is a corporation organized under the laws of the U.S. territory of American Samoa. It is not directly or indirectly controlled by any other corporation. STI currently is a Commission licensee through its interests in a radio paging station and an FM radio station in Pago Pago. STI states that, upon grant of the instant application, it intends to operate as a common carrier subject to the jurisdiction of the Commission. It advises that it will offer its services to the public, file tariffs with the Commission setting forth its rates and charges, comply with applicable statutory requirements and Commission rules, adhere to accepted accounting practices and otherwise fulfill its obligations as a common carrier subject to the Commission's jurisdiction.

4. Moreover, the continued operation of the earth station by STI will be in the public interest because it will provide high quality direct satellite communications circuits to American Samoa.[3] Comsat, which through its various subsidiaries has owned and operated the earth station since its authorization in 1979, has made a business decision to divest itself of its multi-purpose earth station interests.[4] STI's purchase of the Tutuila earth station will allow Comsat to implement in part its business decision while ensuring the continuity of service provided through the station. To facilitate the transition and ensure the quality of service provided through the station, STI agrees, in the Agreement of Sale,[5] to offer employment to the existing earth station personnel and Comsat-CES agrees to assist STI with the planning and training necessary for future operations. STI will offer its services on a tariffed, non-discriminatory basis, and will purchase the earth station for $482,000, which is the facility's net book cost.

IV. CONCLUSION/ORDERING CLAUSES

5. In view of the foregoing, we find that the proposed arrangements meet the relevant statutory requirements. Therefore, IT IS HEREBY CERTIFIED that the public interest, convenience and necessity require that Samoa Technologies, Inc. acquire and operate the interests of Comsat-CES in the Tutuila, American Samoa earth station.

6. Accordingly, IT IS ORDERED that the application of STI, File No. I-T-C-89-123, IS GRANTED, and STI is authorized to acquire and operate the interests of Comsat-CES in the Tutuila earth station and to offer earth station services under tariff to authorized users.

7. IT IS FURTHER ORDERED that the application of Comsat-CES, File No. CSG-89-101-TC/AL, IS GRANTED, and the applicant is authorized to assign its radio station licenses or permits for the Tutuila international earth station to STI.

8. The Commission retains jurisdiction over this matter to ensure that all present and future authorized carriers have nondiscriminatory use of, and equitable access to, the communications satellite system and earth stations.

9. This order is issued under Section 0.291 of the Commission's Rules and Regulations, 47 C.F.R. Section 0.291 (1985), and is effective on release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Communications Satellite Corporation, File Nos. 325-CSG-P-78, I-P-C-7352-14 (Com. Car. Bur., released Jan. 25, 1979) (Tutuila earth station authorization order).

[2] STI also asks that the Commission not impose any regulatory obligations on the Government of American Samoa with respect to the tariffing of local and intra-island service or interconnection of such service to STI. Our decision today involves only STI's provision of interstate and foreign communications services, *see* 47 U.S.C. Section 153(e)-(g) (1989). As a carrier authorized to provide multi-purpose earth station services, STI must provide any authorized carrier nondiscriminatory use of, and equitable access to, its earth station. *See* 47 U.S.C. Sections 702(7), 721(c)(2) (1989). It also may have a Section 201 duty to interconnect with other carriers, *see* 47 U.S.C. Section 201(a) (1989).

[3] We find that, under the Commission's international competitive carrier policies, STI is dominant in its provision of international multi-purpose earth station services in American Samoa. In its *International Competitive Carrier* decision, the Commission classified as dominant U.S. carriers providing IMTS for non-contiguous points because these carriers currently do not face competition in their markets, and found Comsat dominant in its provision of multi-purpose earth station services. It required any application to initiate multi-purpose earth station services to include adequate information for the Commission to make a finding as to the issue of non-dominance. *International Competitive Carrier Policies*, 102 F.C.C. 2d 812, 832, 839, 844-45 (1985) *recon. denied* 60 Rad. Reg. 2d (P&F) 1435 (1986). STI has provided no specific information respecting the issue of non-dominance. Moreover, STI, as the sole provider of international multi-purpose earth station services for American Samoa, would not appear to face effective competition in its market.

[4] *See* Communications Satellite Corporation, 2 FCC Rcd 7202, 7206 (Com. Car. Bur. 1987) at n. 2.

[5] *See* Letter from Comsat Earth Stations, Inc to Secretary, FCC (June 20, 1989), enclosing Contract CES-116, the Agreement of Sale between Comsat-CES and STI for the Tutuila facility.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 20, 1989

REQUEST FOR WAIVER OF HEARING AID COMPATIBILITY REQUIREMENT

Matsushita Electric Industrial Co., Ltd. and Matsushita Communication Industrial Co., Ltd. (Matsushita) filed a request seeking a waiver of Section 68.4 of the Commission's rules, 47 C.F.R. § 68.4. Section 68.4 requires nearly all telephones manufactured, or imported for use, in the United States after August 16, 1989, to be compatible with hearing aids equipped with telecoils.

Matsushita states that it is developing a new CRT Attendant Console/Data Terminal (CRT Console) designed to be used only by a telephone operator when used with Matsushita's PBX systems. When the CRT Console is used with its PBX systems, Matsushita states, the telephone attached to the CRT Console is not hearing aid compatible (HAC). (All other telephones used with these PBX systems are.) It contends that if the use of a HAC handset were employed in this arrangement, its magnetic field could cause video interference on the CRT Console. Any attempt to shield the CRT Console not only would increase the cost, but also would degrade the quality of the video signal. Because the unit is intended to be used at a single location and only by a hearing individual, Matsushita believes a waiver of the telephone HAC requirement is appropriate.

Section 68.5 of the rules allows for waiver of the HAC requirement provided that the waiver application demonstrates that the requirement is infeasible or too costly to meet.

Interested parties should file comments on this waiver request by **October 6, 1989,** and reply comments by **October 23, 1989,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Robert James, Common Carrier Bureau, FCC, Room 6332, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Matsushita's request can be obtained from ITS at (202) 857-3800.

For further information, contact Robert James, at (202) 634-1831 (voice or TDD).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-32

In the Matter of

Amendment of Section 73.202(b), RM-6454
Table of Allotments,
FM Broadcast Stations.
(Fort Smith and Clarksville,
Arkansas)

REPORT AND ORDER

Adopted: August 28, 1989; Released: September 20, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 1633 (1989), issued in response to a request filed on behalf of George T. Hernreich (petitioner), licensee of Station KBBQ-FM,[1] Channel 265A, Fort Smith, Arkansas, proposing the substitution of Channel 264C2 for Channel 265A and modification of his license to specify operation on Channel 264C2. The *Notice* also proposed the substitution of Channel 295A for Channel 263A at Clarksville, Arkansas, for which an application is pending,[2] to accommodate the proposal.[3] Petitioner and Richardson filed joint comments in support of the proposal. No other comments were received.

2. We believe the public interest would be served by substituting Channel 264C2 for Channel 265A at Fort Smith and by substituting Channel 295A for Channel 263A at Clarksville, Arkansas, as such action could provide an additional expanded coverage FM service to the Fort Smith area. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Station KBBQ-FM to specify operation on Channel 264C2. Additionally, we are substituting Channel 295A for Channel 263A at Clarksville, Arkansas, to accommodate the Fort Smith modification. In accordance with Commission policy, the Clarksville applicant may amend his application to specify the new channel without loss of "cut-off" protection since the channel classes are equivalent. *See, Salamanca, NY and Bradford, PA*, 50 FR 26208 (1985); and *Sanibel, FL*, 50 FR 32706 (1985).

3. As indicated in the *Notice*, Channel 254C2 can be substituted for Channel 263A at Fort Smith at the site specified in the petitioner's proposal,[4] in conformity with Section 73.207(b) of the Commission's Rules. Channel 295A can be substituted for Channel 263A at Clarksville, consistent with the Commission's rules, provided the transmitter is sited at least 9.3 kilometers (5.8 miles) east[5] of the community.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 6, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Clarksville, Arkansas	224A, 295A
Fort Smith, Arkansas	229C, 256C, 260C, 264C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of George T. Henreich for Station KBBQ-FM, Fort Smith, Arkansas, IS MODIFIED effective **November 6, 1989,** to specify operation on Channel 264C2 in lieu of Channel 265A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to J. L. Richardson, P.O. Box 37, Clarksville, AR 72830.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Station KBBQ-FM was incorrectly identified in the *Notice* as KBBZ-FM.

[2] An application for Channel 263A was filed by J. L. Richardson ("Richardson") (BPH-881017MI).

[3] The distance between the two communities is 80.6 kilometers, whereas 105 kilometers is required between first adjacent Class A and C2 channels.

[4] Coordinates used for Channel 264C2 at Fort Smith are 35-13-26 and 94-21-30.

[5] Coordinates used for Channel 295A at Clarksville are 35-28-34 and 93-21-41.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-392

In the Matter of

Amendment of Section 73.202(b), RM-6766
Table of Allotments,
FM Broadcast Stations.
(Clinton and Varnado, Louisiana)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: August 23, 1989; Released: September 20, 1989

By the Chief, Allocations Branch:

1. At the request of Hoffman Media of Louisiana, Inc. (petitioner), the Commission considers herein a petition for rule making seeking the substitution of Channel 224C2 for Channel 224A at Clinton, Louisiana, and modification of the license for Station WQCK(FM) at Clinton to specify operation on the higher class co-channel. Petitioner, the licensee of Station WQCK(FM), also suggests the subtitution of Channel 225A for Channel 224A at Varnado, Louisiana, and the modification of the license for Station WBOX-FM to specify the different frequency in order to accomplish the upgrade at Clinton.

2. We believe the public interest could be served by proposing the substitution of Channel 224C2 for Channel 224A at Clinton, Louisiana, based on the fact that an expression of interest in providing that community with its first wide coverage area FM service. Channel 224C2 can be allotted to Clinton in compliance with the Commission's minimum distance separation requirements at the station's existing transmitter site,[1] if the suggested channel change is made at Varnado.

3. As requested, we shall propose to modify the license for Station WQCK(FM) at Clinton to specify operation on Channel 224C2 in lieu of Channel 224A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Clinton.

4. We are herein issuing a *Show Cause Order* to Bogue Chitto Communication Company, licensee of Station WBOX-FM at Varnado, seeking comments as to why its license should not be modified to specify operation on Channel 225A in lieu of Channel 224A. Commission policy requires that Station WBOX-FM be reimbursed for the reasonable costs of changing its frequency. Petitioner has stated its willingness to reimburse Station WBOX-FM.

5. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Clinton, Louisiana	224A	224C2
Varnado, Louisiana	224A	225A

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Bogue Chitto Communication Company, licensee of Station WBOX-FM, Channel 224A, Varnado, Louisiana, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 225A in lieu of Channel 224A.

7. Pursuant to Section 1.87 of the Commission's Rules, Bogue Chitto Communication Company may, not later than **November 13, 1989,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Bogue Chitto Communication Company, to furnish additional information. If Bogue Chitto Communication Company, raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Bogue Chitto Communication Company will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Bogue Chitto Communication Company
P. O. Box 351
Columbia, MS 39429

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **November 13, 1989,** and reply comments on or before **November 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Jeffrey D. Southmayd
Southmayd, Powell & Taylor
1764 Church Street, N.W.
Washington, D. C. 20036
(Counsel for petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table

of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 30-55-54 and 91-06-43.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-393

In the Matter of

Amendment of Section 73.202(b), RM-6825
Table of Allotments,
FM Broadcast Stations.
(Espanola, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 21, 1989; Released: September 20, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Holt Corporation of New Mexico (petitioner), requesting the substitution of Channel 272C3 for Channel 272A at Espanola, New Mexico, and the modification of its license for Station KMIO(FM) to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 272C3 can be allotted to Espanola in compliance with the Commission's minimum distance separation requirements and can be used at its present transmitter site.[1] As requested, we also propose to modify petitioner's license for Station KMIO(FM) to specifiy operation on Channel 272C3 in lieu of its present Channel 272A. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 272C3 at Espanola or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 272C3 for Channel 272A at Espanola, New Mexico, since it could enable Station KMIO(FM) to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Espanola, New Mexico	272A	272C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 13, 1989,** and reply comments on or before **November 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Alan G. Moskowitz, Esq.
Kaye, Scholer, Fierman, Hays & Handler
The McPherson Building
901 - 15th Street, N.W., Suite 1100
Washington, D.C. 20005
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 35-54-01 and West Longitude 105-53-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-26

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Sisters, Oregon) — RM-6518

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 22, 1989; Released: September 20, 1989

By the Chief, Allocations Branch:

1. At the request of Schuyler H. Martin (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 1614 (1989), proposing the allotment of Channel 281A to Sisters, Oregon, as the community's first local FM service. The petitioner filed comments in which he reiterates his intention to apply for the channel, if allotted. No other comments were received. Channel 281A can be allotted to Sisters in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. We believe the public interest would be served by allotting Channel 281A to Sisters, Oregon, since an interest has been expressed in providing the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 6, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Sisters, Oregon	281A

3. The window period for filing applications will open on **November 7, 1989,** and close on **December 7, 1989.**

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 44-17-30 and West Longitude 121-33-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-607

In the Matter of

Amendment of Section 73.202(b), RM-6488
Table of Allotments,
FM Broadcast Stations.
(Ashtabula, Ohio)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 22, 1989; Released: September 20, 1989

By the Chief, Allocations Branch:

1. At the request of Rod A. Callahan (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 1236 (1989), proposing the allotment of Channel 252A to Ashtabula, Ohio, as the community's second local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted.[1]

2. We believe the public interest would be served by allotting Channel 252A to Ashtabula, Ohio, since it could provide the community with its second local FM service. Channel 252A can be allotted to Ashtabula in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.0 kilometers (3.7 miles) northeast to avoid a short-spacing to Station WNCX, Channel 253B, Cleveland, Ohio.[2] Canadian concurrence in the allotment has been received since Ashtabula is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 6, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Ashtabula, Ohio	246B, 252A

4. The window period for filing applications will open on **November 7, 1989,** and close on **December 7, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Don E. Martin, President, Station WDON(FM), Geneva, Alabama, filed a pleading. However, Martin failed to serve a copy of his comments on the petitioner as required by Section 1.420 of the Commission's Rules. Therefore, Martin's comments are *ex parte* and will not be considered herein.

[2] The coordinates for this allotment are North Latitude 41-54-27 and West Longitude 80-43-52.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-580

In re Applications of

COMMUNITY BROADCASTING CO., INC.	File No. BPH-860916MD
JOHN F. WHITE	File No. BPH-860918OB

For Construction Permit for a
New FM Station on Channel 250A
at Wiggins, Mississippi

MEMORANDUM OPINION AND ORDER

Adopted: September 8, 1989; Released: September 20, 1989

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN

1. By *Initial Decision*, 4 FCC Rcd 1986 (1989) (I.D.), Administrative Law Judge Joseph Chachkin (ALJ) found both captioned applicants herein fully qualified to be Commission licensees, but determined on a comparative basis that Community Broadcasting Co., Inc. (Community) was the preferred applicant. John F. White (White) filed exceptions with the Board, and Community responded with a reply thereto. White subsequently filed a Motion to Enlarge Issues (and Reopen the Record), and oral argument was heard on July 28, 1989.

2. However, now before the Board is the "Joint Petition for Approval of Settlement [Agreement]" filed by both parties on September 5, 1989, and as supplemented by White on September 7, 1989. Therein, White proposes to pay Community certain sums in exchange for the dismissal of Community's application.[1]

3. Pursuant to Section 73.3525 of the Commission's Rules, 47 C.F.R. §73.3525 (which implements 47 U.S.C. §311(c), as amended), the parties have submitted their proposed settlement agreement, accompanied by the required declarations indicating that their respective applications were filed in good faith and not for the purposes of reaching or carrying out a settlement agreement. The parties also urge that the proposed settlement agreement will be in the public interest, will conserve the resources of the Commission, and will expedite initiation of new FM broadcast service at Wiggins, Mississippi. In light of the foregoing, and in the absence of any basic qualifying issues extant against either party, we find no impediment to the amicable settlement of this proceeding.

4. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend, filed April 18, 1989, by John F. White IS GRANTED, and the amendment IS ACCEPTED; and,

5. IT IS FURTHER ORDERED, That the Motion to Reopen Record and to Enlarge Issues filed by John F. White on April 18, 1989, IS DISMISSED as moot; and,

6. IT IS FURTHER ORDERED, That the Joint Petition for Approval of Settlement [Agreement] filed September 5, 1989 by John F. White and Community Broadcasting Co., Inc., as supplemented by John F. White on September 7, 1989, IS GRANTED; that the Settlement Agreement IS APPROVED; that the application of Community Broadcasting Co., Inc. (File No. BPH-860916MD) IS DISMISSED; and that the application of John F. White (File No. BPH-860918OB) IS GRANTED; and,

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTE

[1] White will initially pay Community $150,000, with an additional $150,000 due over a specified period of time in the event White is successful in "upgrading" the proposed facility to a "Class C3" FM channel. Should White be limited to a "Class C2 upgrade," White's additional payment to Community will be limited to an additional $50,000.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-394

In the Matter of

Amendment of Section 73.202(b), RM-6864
Table of Allotments,
FM Broadcast Stations.
(North Mankato, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 23, 1989; Released: September 21, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Minnesota Valley Broadcasting Company (petitioner), requesting the substitution of FM Channel 244C3 for Channel 244A at North Mankato, Minnesota. Petitioner also requests modification of its license for Station KDOG(FM), Channel 244A, to specify Channel 244C3.

2. We believe petitioner's proposal warrants consideration. Channel 244C3 can be allotted to North Mankato, Minnesota, in compliance with the Commission's spacing requirements at the petitioner's specified site, 8.7 kilometers south of the community.[1] The allotment of Channel 244C3 at North Mankato is contingent on Station KWWK, Channel 244A, Rochester, Minnesota, being licensed on Channel 243C2, in accordance with construction permit BPH880811IA. We shall withhold final action in this proceeding until the license grant occurs at Rochester. We shall also propose to modify the license of Station KDOG(FM), Channel 244A, to specify operation on Channel 244C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for the North Mankato, Minnesota area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
North Mankato, Minnesota	244A	244C3

4. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Notice* by Certified Mail, Return Receipt Requested, to the following:

Olmstead County Broadcasting Co.
1220 4th Avenue, S.W.
Rochester, Minnesota 55902

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 13, 1989,** and reply comments on or before **November 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

M. Scott Johnson
Catherine M. Grofer
Gardner, Carton & Douglas
1001 Pennsylvania Avenue, N.W.
Suite 750-N
Washington, D.C. 20004
(Counsel for the petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 244C3 are 44-05-47 and 94-01-02.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-395

In the Matter of

Amendment of Section 73.202(b),	RM-6780
Table of Allotments,	
FM Broadcast Stations.	
(Kailua-Kona, Hawaii)	

NOTICE OF PROPOSED RULE MAKING

Adopted: August 23, 1989; Released: September 21, 1989

By the Chief, Allocations Branch:

1. Sirius Communications, Inc. (petitioner), permittee of Station KLUA(FM), Channel 229C1, Kailua-Kona, Hawaii, has filed a petition for rule making requesting the substitution of Channel 230C for Channel 229C1 and modification of its construction permit to specify operation on the higher class channel. Petitioner states its intention to apply for the channel, if allotted.

2. In support of the proposal, petitioner states that the proposed change will allow for a more efficient use of the spectrum by permitting improved coverage of the western coast of the Island of Hawaii. Channel 230C can be substituted for Channel 229C1 at Kailua-Kona in compliance with Section 73.207 of the Commission's Rules.[1]

3. As requested, we shall propose to modify the construction permit for Station KLUA(FM) at Kailua-Kona, Hawaii, to specify operation on Channel 230C in lieu of Channel 229C1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest or require that the petitioner demonstrate the availability of an additional equivalent channel at Kailua-Kona, Hawaii.

4. In view of the fact that the proposed substitution of Channel 230C for Channel 229C1 at Kailua-Kona could provide that community with an improved wide coverage area FM service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Kailua-Kona, Hawaii	229C1	230C

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 13, 1989,** and reply comments on or before **November 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

James M. Weitzman
Kaye, Scholer, Fierman, Hays & Handler
901 15th Street, N.W., Suite 1100
Washington, D. C. 20005

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 230C are North Latitude 19-38-24 and West Longitude 155-59-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-396

In the Matter of

Amendment of Section 73.606(b), RM-6783
Table of Allotments,
TV Broadcast Stations.
(Baxley, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 23, 1989; Released: September 21, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed on behalf of Eddie Ray Upchurch (petitioner) requesting the allotment of UHF television Channel 34 to Baxley, Georgia, as that community's first local television service.

2. Baxley (population 3,586)[1] seat of Appling County (population 15,565), is located in southeastern Georgia approximately 290 kilometers southeast of Atlanta.

3. A staff engineering analysis reveals that UHF television Channel 34+ can be allotted to Baxley, Georgia, without a site restriction.[2]

4. It should be noted that the Commission has recently imposed a freeze on television allotments or applications therefor, in certain metropolitan areas.[3] However, Baxley is not in one of the affected areas.

5. In view of the above, the Commission considers it appropriate to seek comments on the proposal to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Baxley, Georgia	--	34+

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

7. Interested parties may file comments on or before **November 13, 1989,** and reply comments on or before **November 28, 1989** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Robert G. Allen,
Denise B. Moline,
McCabe & Allen
P. O. Box 2126,
Manassas Park, Virginia 22111.

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures were taken from the 1980 U.S. Census.

[2] The coordinates are North Latitude 31-46-42 and West Longitude 82-21-00.

[3] *See* Notice of Inquiry, 2 FCC Rcd 5125 (1987), and Order, 52 FR 28346, July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-397

In the Matter of

Amendment of Section 73.202(b), RM-6632
Table of Allotments,
FM Broadcast Stations.
(Princeton, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 23, 1989; Released: September 21, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by WZOE, Inc., licensee of WZOE(FM), Channel 252A, Princeton, Illinois, seeking the substitution of Channel 251A for Channel 252A and modification of its license for Station WZOE(FM) to specify operation on Channel 251A.

2. We believe the petitioner's proposal warrants consideration since it could improve service to WZOE's listening area. A staff engineering analysis has determined that the proposed substitution of Channel 251A for Channel 252A can be achieved in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction 8 kilometers (5 miles) east[1] to avoid short spacing to Channel 251C1, Station KHAK(FM), Cedar Rapids, Iowa.

3. In accordance with petitioner's request, we shall propose to substitute Channel 251A for Channel 252A at Princeton, Illinois. We shall also propose to modify its license to specify operation on Channel 251A. We will not accept other expressions of interest in the use of Channel 251A at Princeton, Illinois.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Princeton, Illinois	252A	251A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 13, 1989,** and reply comments on or before **November 28, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

John R. Wilner
Bryan, Cave, McPheeters & McRoberts
1015 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-21-09 and West Longitude 89-22-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-449

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Seligman, Arizona) — RM-6329

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 24, 1989; Released: September 22, 1989

By the Chief, Allocations Branch:

1. At the request of Rick L. Murphy (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 5703 (1988), proposing the allotment of FM Channel 251A to Seligman, Arizona, as that community's first local broadcast service. Petitioner stated an intention to apply for the channel, if allotted. In response to the *Notice*, Lucky Communications Inc. ("Lucky") filed comments requesting consideration of Channel 277A rather than Channel 251A to Seligman, in order to avoid a conflict with its proposal in MM Docket No. 88-473 for the allotment of Channel 252C2 to Prescott Valley, Arizona.

2. In response to Lucky's request, we shall consider Channel 277A at Seligman, Arizona. Channel 277A can be allotted to Seligman in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[1]

3. We believe the public interest would be served by allotting Channel 277A to Seligman, Arizona, since it could provide a first local broadcast service to the community. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 6, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Seligman, Arizona	277A

4. The window period for filing applications to Channel 277A, Seligman, Arizona will open on **November 7, 1989,** and close on **December 7, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Ordee D. Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates used for Channel 277A are 35-19-36 and 112-52-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-318

In the Matter of

Amendment of Section 73.202(b), RM-6387
Table of Allotments,
FM Broadcast Stations.
(York, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 24, 1989; Released: September 21, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 4241 (1988), issued in response to a petition filed on behalf of Grantell Broadcasting Company, "petitioner"), licensee of Station WSLY(FM), Channel 257A, York, Alabama, proposing the substitution of Channel 285C2 for Channel 257A and modification of its license accordingly. Petitioner filed supporting comments. Wayne Booth Dowdle, Jr. ("Dowdle") also filed comments supporting the allotment at York and stated an intention to apply for the channel, if allotted.

2. The *Notice* stated that this proposal could be implemented in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is restricted to an area 26.2 kilometers (16.3 miles) south. We have since determined that Channel 285C2 may be sited 25.6 kilometers (15.9 miles) south.[1] Use of the latter site negates a short-spacing to Station WZZK(FM), Channel 284C, Birmingham, Alabama,[2] Station WBKJ(FM), Channel 286C1, Kosciusko, Mississippi,[3] and the application (BPH-890329IE) of Station WKKY(FM), Moss Point, Mississippi, to modify its facilities to specify Channel 285C2.[4]

3. Moreover, the *Notice* advised that this proposal could be accommodated in conjunction with the proposed modification of Station WHOD(FM), Jackson, Alabama, from Channel 285A to Channel 233A. *See* MM Docket No. 87-216. Therefore, petitioner was advised that if the proposal at York ultimately prevailed as a result of the move of Station WHOD(FM) from Channel 285A, the successful permittee at York would be required to equally share in the reimbursement costs with Station WKKY(FM), citing *Naguabo, Puerto Rico*, 51 FR 30363, August 26, 1986. Furthermore, the *Notice* stated that the reimbursement commitment would be expected of any interested party at York, or any counterproponent whose proposal would likewise require the Jackson, Alabama substitution. In response to the *Notice*, petitioner stated its intention to provide such reimbursement, as required by Commission policy, but Dowdle failed to do so in his initial comments.[5]

4. Section 1.420 of the Commission's Rules states that a station's license may be modified in rule making to specify a non-adjacent higher powered channel if no other timely expression of interest is filed, or if there is another equivalent channel available for use by such interested parties. Although Dowdle filed an expression of interest, in view of his failure to provide the requisite reimbursement pledge, his competing expression of interest in the non-adjacent modification proposal at York is rendered invalid. In view of our determination, and since no other acceptable interest in the proposal was expressed, pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we shall modify the license of Station WSLY(FM) to specify operation on the higher class channel.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 6, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
York, Alabama	285C2

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Grantell Broadcasting Company for Station WSLY(FM), IS MODIFIED effective **November 6, 1989,** to specify operation on Channel 285C2 in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by regular mail to Jackson County Broadcasting Co., Inc. Radio Station WKKY(FM), Box 1789, Pascagoula, MS 39567, and to Vogel Ellington Corporation, Radio Station WHOD(FM), P.O. Box 518, Jackson, AL 36545.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates used for Channel 285C2 at York are 32-16-26 and 88-12-19.

[2] Coordinates at the licensed site of Station WZZK-FM are 33-29-02 and 86-48-21.

[3] Coordinates at the licensed site of Station WBKJ(FM) are 33-03-51 and 89-36-12.

[4] Coordinates at the site specified in the application of Station WKKY(FM) are 30-34-08 and 88-22-48.

[5] Petitioner challenged Dowdle's comments since he failed to timely supply the required commitment to reimburse Station WHOD(FM), and questioned Dowdle's ability to finance the necessary changes. After the record closed, Dowdle filed a motion to supplement comments to include his commitment to reimburse Station WHOD(FM), which petitioner opposed. In its opposition, petitioner alleges that Dowdle is a plumber from Meridan, Mississippi, and a friend of the manager of a Meridian, Mississippi, station. Petitioner also alleges that Dowdle's pleadings were prepared by Larry Fuss, an engineer who has worked at Meridian radio stations. Petitioner alleges that Dowdle is a "front" for Fuss or an entity represented by Fuss. Dowdle filed a reply to the opposition. In his opposition, Dowdle argues that, although his statement of intent to reimburse was untimely, it should nontheless be considered. Dowdle notes that, in *Brookville and Punxsutawney, PA*, 3 FCC Rcd 5555 (1988), the Commission announced prospectively a policy in all proceedings of rejecting expressions of interest that fail to include a necessary reimbursement pledge, and that he filed his expression of interest prior to the announcement of that policy. In its motion to strike Dowdle's opposition, petitioner counters that the *Notice of Proposed Rule Making* in this proceeding, unlike the *Notice of Proposed Rule Making in the Brookville* case Dowdle refers to, clearly placed Dowdle on notice that his expression of interest could be dismissed if it did not include a reimbursement pledge, and, therefore, *Brookville and Punxsutawney* is not a bar to rejection of Dowdle's expression of interest. We agree. Moreover, Dowdle failed to provide any assurance that he would be able to finance the reimbursement. Accordingly, his expression of interest will be disregarded.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE AMERITECH
OPERATING COMPANIES

Plan to Provide Comparably Efficient
Interconnection to Providers of
Line-Side Interactive Audiotex Services

MEMORANDUM OPINION AND ORDER

Adopted: September 11, 1989 Released: September 21, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 23, 1989, pursuant to the requirements that the Commission adopted in the *Computer III* proceeding,[1] the Ameritech Operating Companies (Ameritech) filed a Comparably Efficient Interconnection (CEI) Plan (Plan) to provide vendors of line-side "Interactive Audiotex Services" (IAS) with interconnection to Ameritech's basic services that would comply with the Commission's CEI requirements.[2] Ameritech filed the Plan because it wishes to engage in the joint promotion of an enhanced line-side IAS service known as "Touch Four" provided by Ameritech Publishing Inc. (API), a separate subsidiary wholly owned by the parent Ameritech Technology Information Corporation.[3] Ameritech states that API operates in compliance with the structural separation requirements established by the Commission in the *Second Computer Inquiry*,[4] and that CEI Plan approval is sought solely to allow joint marketing of Touch Four service.[5] In this Order, we approve the Ameritech Plan.

II. THE PLAN

A. Service Description

2. The Touch Four offering allows customers to access audiotext messages provided by various entities by dialing a local, seven-digit, gateway number.[6] After connection to API's computer, each caller hears a recorded message that prompts him to tone pulse[7] a four-digit number to access the audio message of his choice.[8] API provides Touch Four service through API computer processors in each LATA that access Ameritech's local networks "through normal Centrex lines provided at tariffed rates."[9]

B. Comparably Efficient Interconnection Parameters

3. Ameritech states that all line-side IAS vendors, including API, will be connected to the telephone network via "identical existing standardized hardware and software interfaces"[10] and may utilize tariffed Centrex lines, business lines and Feature Group A access for access to the local network,[11] although API, as noted above, currently uses Centrex lines to provide Touch Four service.[12] Ameritech recognizes that Centrex is a bundled service, but states that the Commission has authorized the use of existing tariffed services as initial CEI components to expedite CEI development.[13] Ameritech states that API will obtain all basic services used to provide Touch Four Service at tariffed rates.[14] Ameritech also states that it will provide "identical basic service functionalities to support the line-side IAS offerings of all vendors . . ., " and that because API, as a separate subsidiary, will not be permitted to collocate its Touch Four equipment with any of Ameritech's operating companies, API "will not enjoy any technical advantages in such characteristics as transmission parameters, quality or reliability."[15] Ameritech further states that it will not provide API with billing services in connection with its Touch Four offering.[16]

4. Ameritech also notes that the time periods for installation, maintenance, and repair of any basic services and/or facilities that it provides under this plan will be identical for all line-side IAS vendors.[17] Ameritech states that it will submit annual affidavits, signed by the officers principally responsible for installation and maintenance operations, attesting that they have followed the procedures in their ONA plan and have not discriminated in installation and maintenance services, or in the quality of those services, on the basis of the identity of the customer.[18]

5. In addition, Ameritech states that it will provide all vendors of line-side IAS offerings with identical capabilities for end user access to the offerings on a non-discriminatory basis, and that all of the basic services that can be used with line-side IAS offerings are both operational and available from Ameritech in all geographic locations.[19] Moreover, Ameritech states that API will not have any advantage in transport and interconnection costs,[20] and notes that numerous services are available to allow providers of line-side IAS services to achieve the lowest possible costs.[21]

C. Other Nonstructural Safeguards

6. Ameritech observes that API's status, as a structurally separate subsidiary that was organized in compliance with the Commission's *Second Computer Inquiry* rules, provides significant safeguards against cross-subsidization. For example, Ameritech states that the equipment used by API to provide Touch Four services is entirely owned, operated, and maintained by API. Moreover, any "joint and common marketing costs" will be allocated in accordance with the Ameritech Part 64 Cost Allocation Manual on file with this Commission. As a consequence, Ameritech states that none of the costs associated with API's Touch Four services will be charged to regulated services ratepayers.[22]

7. In addition, Ameritech states that it will provide customer proprietary network information (CPNI) in accordance with all existing and any future amendments to the CPNI provisions in Ameritech's Open Network Architecture Plan.[23] Ameritech also states that it will comply with the Commission's *Third Computer Inquiry* network disclosure requirements although no changes to existing network interface specifications are required for the purpose of providing line-side IAS.

III. COMMENTS AND REPLIES

8. Telesphere Network Inc. (Telesphere),[24] and Omnicall, Inc. (Omnicall) filed comments.[25] Ameritech filed reply comments.[26] Telesphere states that the plan does not specify the types of assistance that will be provided to API or whether Ameritech will be compensated.[27] Thus, Telesphere requests that we withhold approval of the plan pending receipt of additional information concerning Ameritech's participation in this venture and associated cost and revenue allocation issues.[28] In addition, Telesphere expresses a general concern that the provision of joint promotional services by "the telephone company" has great potential for cross-subsidization and anticompetitive activity.[29] Telesphere also states that Ameritech has refused to provide Centrex and local business lines to Telesphere for the provision of enhanced services on the ground that Telesphere is a common carrier, and requests that the Plan be modified to include the provision of local business lines to enhanced service providers that are also common carriers.[30] Telesphere also contends that Ameritech may provide subsidies or rebates to API through its joint provision of promotional services,[31] and questions whether comparable promotional services will be offered to other enhanced service providers.[32] Telesphere states that promotional activity with Ameritech "transfers some of the goodwill associated with the LEC's basic services and its monopoly customer base to its enhanced services affiliate."[33] Telesphere suggests that we may wish to consider precluding joint promotional activities as contrary to the public interest, or, in the alternative, require API to pay a royalty to Ameritech as "compensation for their goodwill from regulated services."[34]

9. Omnicall also contends that consideration of Ameritech's plan should be delayed until Ameritech provides additional information.[35] In particular, Omnicall notes that Ameritech does not provide information concerning the costs that Ameritech will charge API or competing audiotext providers. Omnicall asks whether Ameritech will charge API for directory advertising and/or telephone bill inserts, and, if so, whether similar promotional services will be available to API's competitors.[36] Omnicall observes that the Plan contains no provision for billing and collection services for competing information providers, and alleges that there is a disparity in the number of digits customers must dial to access API and competing audiotext services.[37] Omnicall questions whether Ameritech revenues, derived from the use of regulated local exchange operations to reach enhanced service providers, will be shared with API, and whether the synergy that Omnicall perceives in the Ameritech-API relationship will preclude effective competition or serve to abet the maintenance of "a virtual monopoly in the yellow page business."[38] Omnicall emphasizes that Ameritech will have revenue sources not available to competitors, and asks whether API's services are designed to increase customer telephone usage, thus increasing message unit revenues but allowing no profits to API and/or competing concerns.[39] Omnicall states that, as a provider of "pay-per-call service," it has not found Ameritech willing to provide a level playing field to competitors and alleges inappropriate behavior by Ameritech with respect to the provision of 976 services and "GAB lines" in its territories.[40]

10. In response, Ameritech states that the issues raised by Telesphere have already been fully resolved by the Commission.[41] Ameritech contends that the Commission, in the *Third Computer Inquiry*,[42] explicitly permitted the Bell Operating Companies to associate their names with enhanced services provided by affiliates. Ameritech observes that Telesphere's concerns with respect to cross-subsidization were addressed in the *Joint Cost* proceeding. It notes that Ameritech has submitted, and the Commission has approved, the Ameritech Cost Accounting Manual (ACAM)[43] which provides "all relevant detail relating to the accounting of transactions between the Companies and their affiliates."[44] Ameritech notes that the Plan reiterates Ameritech's commitment to the Commission's cost accounting requirements, and states that costs associated with Touch Four Service will not be charged to ratepayers using regulated services.[45] Ameritech notes that royalty payments have not been required in the past by the Commission, and states that requiring API to pay royalties to compensate Ameritech for goodwill is not consistent with the intent of the Commission as expressed in the *Third Computer Inquiry*.[46]

11. Ameritech states that Omnicall's letter reflects a lack of understanding of its Plan and raises issues that bear no relationship to Ameritech's CEI proposal.[47] For example, Ameritech states that its Plan does not mention 976 or 900 services because those services are not utilized in providing Touch Four service.[48] Instead, the Plan describes the Ameritech facility/service arrangements that API will use in providing Touch Four services, all of which are available pursuant to tariff. Ameritech also states that the Plan does not include, or describe, billing or collection services because API will not utilize Ameritech's billing and collection services in providing Touch Four.[49] Ameritech states that API's customers can access Touch Four service using a seven-digit number and that other IAS providers will be able to obtain identical seven-digit access for their end users.[50]

IV. DISCUSSION

12. Contrary to Telesphere's and Omnicall's contentions, Ameritech has provided sufficient information in its Plan and reply comments to enable us to conclude that the Plan complies with the Commission's CEI requirements. All of the basic services API receives from Ameritech for its Touch Four service will be available to other line-side IAS providers at equal terms, prices, and conditions.[51] As a consequence, API will not enjoy any advantage over its competitors with respect to the provision of those services by Ameritech.

13. Telesphere and Omnicall also raise a number of questions concerning cross-subsidization or other telephone company support for API's operations. However, we do not find that these concerns warrant disapproval of the Plan. The cost of joint promotional activities will be allocated as provided in the Ameritech cost allocation manual that has been filed pursuant to the requirements of the *Joint Cost* proceeding. Thus, joint promotional activities will not result in subsidization of API's Touch Four Service by ratepayers using regulated services.[52] Omnicall also expresses concern that Ameritech will have revenue sources not available to its competitors, and that Ameritech may share operating company revenues resulting from demand stimulation with API, or that revenues generated by the Ameritech operating companies may

otherwise be channelled to API. The Commission, however, has not precluded parent holding companies from investing their earnings from regulated exchange carrier operations in the provision of enhanced services, and we accordingly conclude that these matters are beyond the scope of this proceeding. If Omnicall wishes to pursue these matters, it may, of course, seek revision of the Commission's *Computer III* and *Joint Cost* rules.[53]

14. Furthermore, we do not believe that API should be required to make royalty payments to Ameritech for any goodwill associated with joint promotional activities. The imposition of such a condition would appear to be inconsistent with the Commission's decisions in the *Computer III* and *Joint Cost* proceedings to allow the BOCs to provide enhanced services on an integrated basis without requiring such payments. Omnicall and Telesphere may, of course, seek revision of the Commission's *Joint Cost* rules to provide for such payments.

15. Nor do we find that the Plan should be revised to cover billing and collection services. The provision of billing and collection services has been deregulated by the Commission, although we did direct the Bell Operating Companies (BOCs) to describe, in their ONA plans, any services they will offer that provide enhanced service providers with information useful in bill preparation.[54] Even if billing and collection were deemed to be basic services subject to the Commission's CEI requirements, Ameritech would not be required to provide such services to API's competitors since the Ameritech operating companies will not provide billing and collection services to API. In addition, we note that Ameritech is not required to provide promotional or advertising services to API's competitors since these services are not basic telecommunications services subject to our CEI requirements.

16. Finally, we view Telesphere's allegations that Ameritech has refused to provide it with Centrex and local business lines for the provision of enhanced services as beyond the scope of this proceeding which concerns compliance with the Commission's CEI requirements. Omnicall's allegations of inappropriate behavior by Ameritech in the provision of 976 services and "GAB lines" in its territories are likewise not proper subjects for consideration in this proceeding.

V. ORDERING CLAUSES.

17. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 1, 4(i) and (j), 201-203, 205, 218, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201-203, 205, 218, and 405, that the Plan IS APPROVED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (*Third Computer Inquiry), Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order), modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration), further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration), second further reconsideration*, FCC 89-226, released August 1, 1989, *appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and *sub nom. Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (*Phase II Order), modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration), further reconsideration*, FCC 89-226, released August 1, 1989 (*Phase II Further Reconsideration), appeal pending sub nom. California v. FCC*, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988).

[2] Plan To Provide Comparably Efficient Interconnection To Providers of Line-Side Interactive Audiotex Services filed by the Ameritech Operating Companies (Mar. 23, 1989) at 1.

[3] *Id.* at 2. The Ameritech exchange carrier companies and API are owned by this holding company. In this Order the term "Ameritech" is generally used to refer to the Ameritech operating companies and not the parent holding company.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 2-3.

[7] The caller must have a Touch-Tone telephone or a Touch-Tone pad. *Id.* at 2.

[8] API does not generate the content of the messages that are provided through the Touch Four service. Instead, information providers supply API with audiotapes that contain the messages. *Id.* at 2-3.

[9] *Id.* at 3. Touch Four service is available in a limited number of cities.

[10] *Id.* at 4.

[11] *Id.*

[12] *Id.* at 4-5.

[13] *Id.* at 5.

[14] *Id.* at 6.

[15] *Id.*

[16] *Id.* at 14.

[17] *Id.* at 7.

[18] *Id.* at 8.

[19] *Id.* at 8-9.

[20] *Id.* at 10.

[21] *Id.* at 9-10. Ameritech states that it will comply with all CEI and disclosure requirements in the event that the services available to support line-side IAS offerings such as Touch Four are modified or augmented in the future. *Id.* at 4.

[22] *Id.* at 11.

[23] *Id.* at 11-13.

[24] Telesphere Comments (Apr. 21, 1989).

[25] Omnicall Comments (Apr. 21, 1989).

[26] Ameritech Reply (May 5, 1989).

[27] Telesphere Comments at 3.

[28] *Id.* at 1.

[29] *Id.* at 4.

[30] *Id.* at n. 2.

[31] *Id.* at 4-7.

[32] *Id.* at 4.

[33] *Id.* at 5.

[34] *Id.* at 6-7. Telesphere also requests clarification of whether Touch Four service will be offered on an interLATA basis. Based on Ameritech's statement that a separate processor is located in each LATA, it does not appear that Touch Four service involves the provision of interexchange service.

[35] Omnicall Comments (Apr. 21, 1989) at 1.

[36] *Id.* at 2.

[37] *Id.* at 3. Omnicall also questions the means that Ameritech proposes to use to keep the enhanced services industry apprised of developments concerning the availability of aggregate CPNI data. We do not find the measures proposed by Ameritech objectionable.

[38] *Id.* at 3.

[39] *Id.*

[40] *Id.* at 3-4.

[41] Ameritech Reply at 3.

[42] *Id.*

[43] *Id.* at 3-4.

[44] *Id.* at 4.

[45] *Id.*

[46] *Id.* at 4, n.4.

[47] *Id.* at 6.

[48] *Id.* at 5-6.

[49] *Id.* at 7.

[50] *Id.*

[51] Based on Ameritech's reply, it appears that API's competitors as well as API will be able to offer seven-digit end user access.

[52] We also note that Ameritech has stated that API will be operated as a fully separated subsidiary pursuant to the requirements of the *Second Computer Inquiry*, except for the provision of joint promotional activities.

[53] Omnicall's concerns about the existence, and maintenance, of "a virtual monopoly in the yellow pages business" by Ameritech are also beyond the scope of this proceeding. Similarly, matters that involve rates that are charged by Ameritech pursuant to tariff, the costs that form the basis for those tariffed rates, and the utilization of revenues that are derived from those tariffs are matters that, with respect to intrastate tariffs, are properly directed to appropriate state bodies and, in the case of interstate tariffs, are more properly addressed in FCC tariff or complaint proceedings.

[54] *See* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1, 178 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TRW, INC. File No. 750935

For a Waiver of the Rules

WAIVER

Adopted: September 13, 1989 Released: September 21, 1989

By the Chief, Land Mobile and Microwave Division:

1. TRW, Inc. (TRW) seeks a waiver of Section 94.191(b) of the Commission's Rules, 47 C.F.R. § 94.191(b), to permit the use on 18 GHz Digital Termination System (DTS)[1] channels of transmitters having a frequency tolerance of +/-0.003%. Section 94.191 requires that DTS nodal stations maintain the carrier frequency to within +/- 0.001% of the assigned frequency.[2]

2. TRW was recently authorized a limited network 18 GHz DTS in the Redondo Beach, California area.[3] Originally, TRW's point-to-multipoint system was intended to transfer CAD/CAM data between its central on-campus computer center and six remote project locations. TRW's need and use for the DTS has since expanded to include also PBX voice traffic and security video. With the capacity per link doubling from 6 to 12 Mb/s, substitution of transmitters is required.[4]

3. TRW argues that customizing available type-notified radios to comply with the 0.001% tolerance is unacceptable due to cost and delay. It pleads that requiring such specialized equipment is purposeless because it would not improve operations by other users. The proposed transmitters have been authorized on each side of the DTS frequencies and TRW believes that such tolerance has proven effective in preventing transmitter shift that might encroach on other users.

4. In establishing the DTS, the Commission adopted the 0.001% tolerance in order to balance the goals of maximum spectral efficiency[5] and equipment affordability.[6] An information per bandwidth long term goal of 1 bit/Hz was used by the Commission in connection with this determination. In TRW's case, each link would be operating at 1.2 bits/Hz efficiency. Even with the looser tolerance, TRW would be operating at more than adequate throughput efficiency.

5. Frequency stability also has an effect on adjacent channel interference. TRW argues in this regard that the 0.003% tolerance is employed effectively with 18 GHz point-to-point channels. The situations are not analogous, however, because licensees of 18 GHz channels are not given the flexibility afforded DTS licensees to use bandwidth as they deem appropriate. Where DTS licensees choose to locate their transmitters will necessarily influence interference to adjacent channel operations, a consideration reflected in the technical requirements for this service. TRW has acknowledged this fact by agreeing to accept a secondary authorization where its choice of transmitter locations dictates. Under these circumstances, we conclude that the intent of Section 94.191(b) will not be undermined and the proposed operation is in the public interest. *See Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

6. Accordingly, pursuant to Sections 0.331 and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.3, TRW's request for waiver of Section 94.191(b) IS GRANTED for an indefinite term on a secondary non-interference basis to existing and future adjacent channel DTS stations.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division

FOOTNOTES

[1] A DTS is a fixed point-to-multipoint system consisting of a central nodal station and multiple user stations intended to provide the exchange of high-speed, high capacity digital information between fixed locations.

[2] User station tolerance is +/-0.003%.

[3] Station WNER-963 is licensed on channel 26 (18835/19175 MHz) with a ten mile area of operation.

[4] TRW has yet to construct its system, which has an operational deadline of January 24, 1990.

[5] The amount of information bandwidth available is dependent upon the frequency stability.

[6] Further, Notice of Proposed Rule Making, GEN Docket 79-188, released September 2, 1981, and Memorandum Opinion and Order, GEN Docket 82-334 and 79-188, released August 17, 1984.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone & Telegraph Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1885

MEMORANDUM OPINION AND ORDER

Adopted: September 13, 1989 Released: September 22, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In the *Joint Cost Order*,[1] the Commission required certain subject carriers, including the American Telephone and Telegraph Company (AT&T), to file manuals for separating the costs of regulated telecommunications services from the costs of nonregulated activities. In response to this requirement, AT&T filed a cost allocation manual on November 12, 1987. That manual described AT&T's nonregulated activities, listed the activities AT&T proposed to treat as incidental activities, and provided information on AT&T's affiliate transactions, employee time reporting procedures, and cost apportionment methods. We permitted AT&T to implement that manual on an interim basis beginning January 1, 1988.[2]

2. Our review of the manual in the *AT&T Order*[3] revealed a need for clarification or revision of certain areas of the manual. Despite these problem areas, we conditionally approved AT&T's manual. We determined that the manual provided adequate assurances against the misallocation of costs and revenues between regulated and nonregulated activities to permit its continued implementation. We required, however, that AT&T submit revisions addressing each of the identified problem areas and that the revisions meet certain substantive requirements. We stated that the revisions would be subject to public comment and our review, and that we would take all appropriate action, including the prescription of specific apportionment procedures, in the event we disapproved any part of the revisions.[4]

3. AT&T has filed both a "Petition for Clarification and Reconsideration" of the *AT&T Order* and two sets of cost manual revisions. The petition, filed April 29, 1988, challenges our requirement that AT&T eliminate "hypothetical allocations" from its manual and requests that, in certain instances, we permit revisions that deviate from the substantive requirements specified in the *AT&T Order*. The first set of revisions, filed May 31, 1988, provides new or more detailed apportionment methods for problem areas identified in the *AT&T Order*. Accompanying these revisions are a group of alternative proposed revisions reflecting the positions urged in AT&T's April 29 petition. The second set of revisions, filed June 30, 1989, also reflect the positions urged in that petition. These revisions propose new apportionment methods for certain accounts and provide updated information regarding AT&T's corporate affiliates, incidental activities, and nonregulated activities. No party commented on the April 29 petition or on either set of cost manual revisions.

4. In this Order, we grant in part AT&T's petition and conditionally approve those cost manual revisions that are consistent with the *AT&T Order*, as modified by that grant. We determine that the manual should include apportionment procedures covering all nonregulated activities that AT&T reasonably anticipates will use its network plant during AT&T's three-year forecast period, and we consider each of AT&T's alternative proposed revisions as part of our review of AT&T's revisions. In reviewing the revisions, including the alternative proposed revisions, we find, subject to certain exceptions, that AT&T has satisfied the Commission's cost apportionment requirements. Before turning to the exceptions, we wish to emphasize that this Order does not discuss many areas in which AT&T has complied fully with Commission requirements and with the *AT&T Order*. We also wish to emphasize that the exceptions are very limited in relation to the manual as a whole. Our approval of the revisions is subject to the filing, within 60 days, of additional information and revisions specified herein.[5]

II. DISCUSSION

A. *Forecasted Nonregulated Usage of the Network*

5. AT&T's initial manual presented a series of apportionment procedures that were apparently intended to accommodate nonregulated activities that the manual did not list. In the *AT&T Order*, we referred to these procedures as "hypothetical allocations" and required that AT&T eliminate them from the manual. We specified that AT&T's apportionment methods should reflect only current, authorized nonregulated services and that AT&T should provide apportionment procedures for additional nonregulated services only when it sought to introduce them.[6]

6. In its petition, AT&T contends that the requirement that it reflect only current, authorized nonregulated services in its manual is inconsistent with the Commission's requirement that carriers apportion investment in central office equipment and outside plant by forecasting the highest nonregulated usage of that equipment and plant over three years.[7] AT&T states that network engineers may be able to foresee nonregulated usage of the network before the enhanced services generating that usage are introduced and even before it is known precisely what the enhanced services will be. AT&T argues that we should clarify the *AT&T Order* to make clear that we did not intend to preclude apportionments based on forecasts of nonregulated usage of central office equipment and outside plant by foreseeable enhanced services.[8]

7. We agree that AT&T's manual should include apportionment procedures for the nonregulated usage of network plant that AT&T reasonably anticipates will occur during its three-year forecast period. Therefore, we eliminate our requirement that the manual reflect only current, authorized nonregulated services. We note that the apportionment methods included in AT&T's June 30, 1989 revisions as well as in the alternative proposed revisions accompanying the May 31, 1988 revisions apparently reflect all nonregulated usage of network plant that

AT&T anticipates during this forecast period. We consider those apportionment methods in the following subsection.[9]

B. *Individual Accounts*

Account 2121-Buildings

8. AT&T's initial manual divided this account into cost pools for "Administrative and Other," "Housing Operating Equipment," and "Towers," each of which was to be apportioned between regulated and nonregulated activities."[10] This cost pool structure appeared inconsistent with the initial manual's apportionment procedures for building space that AT&T's operating companies rent to non-affiliates. Under those procedures, such rentals were treated as incidental to AT&T's regulated operations, and thus were classified as regulated for apportionment purposes.[11] Accordingly, in the *AT&T Order*, we ordered AT&T to modify its apportionment methods for this account. We stated that AT&T must revise its manual to provide an additional cost pool that identifies investment in building space rented to others. We required AT&T to assign this investment directly to regulated activities to the extent it results from incidental rentals and directly to nonregulated activities to the extent it results from nonregulated activities.[12]

9. In compliance with the requirements of the *AT&T Order*, AT&T's May 31, 1988 revisions add cost pools for "Building Space Rented to Others - Regulated" and "Building Space Rented to Others - Nonregulated" within this account.[13] However, in its petition, AT&T contends that the "Building Space Rented to Others - Regulated" pool should not be required. AT&T states that the regulated pool would consist of investment in building space that is rented to others on an incidental basis. AT&T argues that its accounting and record keeping systems do not presently identify investment attributable to such rentals. AT&T maintains that identifying such investment would be burdensome and would serve no useful purpose, and that we should reconsider and eliminate our requirement that such an identification be made.[14] In the event we eliminate that requirement, AT&T proposes to eliminate the "Building Space Rented to Others - Regulated" pool from this account.[15]

10. We agree that it would be unnecessarily burdensome for AT&T to create a cost pool for the building space it rents to others as an incidental activity. Accordingly, we eliminate the requirement contained in the *AT&T Order* that AT&T assign its investment in building space that is rented to others directly to regulated activities, and we allow AT&T to eliminate its "Building Space Rented to Others - Regulated" cost pool. AT&T must, however, continue to assign to regulated activities all revenue from incidental rentals.

11. We believe, in addition, that it may be appropriate for AT&T to eliminate the cost pool for "Building Space Rented to Others - Nonregulated" that is included in the manual in response to the *AT&T Order*. Although AT&T states that it has no objection to maintaining this pool,[16] the nonregulated activities section of the manual does not list any rental activity that might be included in this pool. In its further revisions, AT&T must state whether it rents building space to non-affiliates on a nonregulated basis. If it engages in such rentals, it shall include that activity in its list of nonregulated activities. If it does not engage in such rentals, it shall eliminate the cost pool for "Building Space Rented to Others - Nonregulated" from its manual.

Account 2682-Leasehold Improvements

12. AT&T's initial manual apportioned this account in the same proportion as the aggregate apportionment of AT&T's "Operating Rents" cost pool in Account 6121 - Land and building expense and "Amortization Expense - Capital Leases" cost pool in Account 6563 - Amortization expense - tangible.[17] In the *AT&T Order*, we required AT&T to revise this method to reflect our determination that AT&T's operating rent and operating lease costs may not have any causal connection to its leasehold improvement costs.[18] In its petition, AT&T states that it makes leasehold improvements in connection with both operating and capital leases. AT&T contends that an apportionment based solely on capital leases would ignore a significant cause of leasehold improvement costs, and thus AT&T proposes to employ the apportionment method set forth in its initial manual.[19] We have carefully considered AT&T's arguments in support of its original apportionment procedure, and we agree that the original procedure is a reasonable method of apportioning the costs in this account. Accordingly, we allow AT&T to employ that original procedure.

Account 5301 - Uncollectible Revenue - Telecommunications and Account 5302 - Uncollectible Revenue - Other

13. In the *AT&T Order*, we required AT&T to revise its manual to include apportionment procedures for Accounts 5301 and 5302.[20] AT&T's revisions list these accounts and propose to apportion them between regulated and nonregulated activities "in the same proportion as the aggregate allocation of Accounts 5110 through 5280."[21] We find that AT&T has failed to justify the use of identical apportionment factors for Accounts 5301 and 5302. In using identical factors, AT&T implicitly assumes that the amounts recorded in the two accounts have identical causes. However, Account 5301 consists of charges for telecommunications revenue that AT&T has either written off or found it impracticable to collect, and Account 5302 consists of charges for non-telecommunications revenue that AT&T has either written off or found it impracticable to collect.[22] In the absence of data showing otherwise, we believe that AT&T's charges to Account 5301 are proportionate to AT&T's relative telecommunications revenue and that AT&T's charges to Account 5302 are proportionate to AT&T's relative non-telecommunications revenue.[23] We therefore require AT&T to file further revisions in which it shall either propose apportionment factors for Accounts 5301 and 5302 that are consistent with AT&T's relative telecommunications and non-telecommunications revenue, or justify in detail alternative methodologies.

Account 6112 - Motor Vehicle Expense

14. AT&T's initial manual apportioned this entire account in proportion to "total wages and salaries."[24] In the *AT&T Order*, we found that apportionment factor insufficient and ordered AT&T to propose a new apportionment method for this account based on the relative apportionment of Account 2112 - Motor vehicles.[25] Although AT&T proposes such a method in its May 31, 1988 revisions, AT&T's argues in its petition that its motor vehicle expense is attributable primarily to rented and leased

vehicles, and not to owned vehicles. AT&T maintains that apportioning this expense solely on the basis of investment in owned equipment would not reflect cost causality.[26] Under the circumstances, we agree with AT&T and accordingly grant reconsideration of the *AT&T Order* in this regard. AT&T may implement the apportionment method for this account set forth in its June 30, 1989 revisions. That method apportions AT&T's motor vehicle expense in proportion to the wages and salaries of the employees that use the motor vehicles.

Account 6113 - Aircraft Expense

15. AT&T's initial manual applied the general allocator to this entire account. In the *AT&T Order*, we rejected that apportionment methodology and required AT&T to apportion its aircraft expense in proportion to its investment in Account 2113 - Aircraft.[27] In its petition, AT&T states that it does not currently own any aircraft and that its aircraft expense is entirely attributable to rented and leased aircraft.[28] We agree that relative aircraft investment could not be a cost causative apportionment factor for aircraft expense under the circumstances. Therefore, we grant reconsideration of the *AT&T Order* in this regard. AT&T may implement the apportionment method for this account set forth in its June 30, 1989 revisions. That method apportions AT&T's aircraft expense in proportion to the wages and salaries of the employees that use the aircraft.

Account 6121 - Land and Building Expense

16. AT&T's initial manual divided this account into three cost pools. The first pool, for "Operating Rents - Plant Related," was to be apportioned "in the same proportion as the aggregate current use of the investment in Accounts 2210-Central Office-Switching." The second pool, for "Operating Rents - Administrative," was to be apportioned based on "the aggregate allocation of the wages and salaries included in Accounts 6611 through 6728." The third, or "Other," pool was to be apportioned "in the same proportion as the aggregate current use of the investment in Account 2111- Land and 2121-Buildings."[29] In the *AT&T Order*, we stated that we did "not believe that investment owned by the carrier is necessarily the most cost causative method of allocating a rental expense" and that "AT&T must amend its proposal to incorporate a more cost causative allocator, such as relative use of the land or buildings that are rented."[30]

17. In its petition, AT&T asserts that its initial manual apportioned rental expense based on the use of rented land and buildings, as the *AT&T Order* recommends, rather than based on the use of owned investment, as that Order implies. AT&T argues that its initial manual "contained the best practicably available allocators for this account" and proposes to retain the method proposed in that manual.[31] AT&T asserts that if it must revise that method, this account should be divided into four cost pools. The first, or "Organizational," pool would consist of land and buildings expense that can be associated with specific employee groups, and would be apportioned in proportion to the wages and salaries of the employees within those groups.[32] The second pool, for "Operating Rents - Central Office Building Space," would be apportioned "in the same proportion as the aggregate current use of the investment in Accounts 2210-Central Office-Switching, 2310-Operator Systems, 2231-Radio Systems and the Terminal Equipment Common cost pool in Account 2232-Circuit Equipment."[33] The third pool, for "Operating Rents-Administrative Office Space," would be apportioned "based on the aggregate allocation of the wages and salaries included in Accounts 6534, 6535, and 6611 through 6728."[34] The final pool, for "Other-House Services," would be apportioned "in the same proportion as the aggregate current use of the investment in Accounts 2111-Land and 2121-Buildings."[35]

18. We intended, in the *AT&T Order*, to require AT&T to develop apportionment factors for its land and building expense that reflect, with reasonable precision, the usage of the property this expense supports.[36] We believe that the factors AT&T initially proposed for apportioning land and building expense do not achieve this objective. Therefore, we will not allow AT&T to reinstate its initial apportionment method.

19. While the alternative method AT&T proposes for apportioning land and building expense appears generally consistent with Commission requirements, AT&T must clarify the contents of its cost pool for "Operating Rents - Central Office Building Space." As previously indicated, AT&T proposes to apportion that pool in the same proportion as the aggregate current use of its regulated affiliates' investment in central office equipment.[37] Some of this equipment may be located in building space that the regulated affiliates own. In that circumstance, AT&T's method would apportion rental expense for central office building space based on the usage of equipment that bears no causal relationship to the rented space. We therefore require AT&T to file further revisions which clarify whether its regulated affiliates own any central office building space. If they own such space, AT&T shall exclude the costs of equipment located on that space from its apportionment factor for this cost pool.

Account 6124 - General Purpose Computers Expense

20. In its initial manual, AT&T divided this account into cost pools for "Network Administration Computers" and "General Administration Information Computers," and employed the general allocator to apportion the latter pool.[38] In the *AT&T Order*, we rejected that use of the general allocator. We required AT&T to apportion that pool in proportion to the results for the parallel pool within Account 2124 - General purpose computers.[39]

21. Although AT&T's May 31, 1988 revisions contain the apportionment factor specified in the *AT&T Order*, AT&T asserts in its petition that its cost pool for "General Administration Information Computers" within Account 6124 includes costs incurred in purchasing computer services and renting computer equipment and computing time, in addition to costs incurred in repairing and maintaining owned computers. AT&T argues that the pool, therefore, lacks a cost causative relationship with computer investment and that use of an investment-based apportionment factor would result in a misapportionment of general purpose computer expenses.[40] In the alternative proposed revisions that accompanied AT&T's May 31, 1988 revisions, AT&T proposes to disaggregate this cost pool into separate pools for "Corporate Operations Computers" and "Customer Operations Computers" that would be apportioned in proportion to the aggregate apportionment of Accounts 6711 through 6728 and Accounts 6611 through 6623, respectively.[41] These pools would be in addition to the pool for "Network Administration Computers" that AT&T proposes to retain, and

to new pools for "Regulated," "Nonregulated," "Organizational," and "Other" general purpose computer expenses that AT&T proposes to create within Account 6124.[42]

22. Under the circumstances, it appears that apportioning AT&T's general administration information computer expense on the basis of the relative apportionment of its general administration information computer investment would be inconsistent with cost causality. The apportionment procedures described in the alternative proposed revisions that accompanied AT&T's May 31, 1988 revisions are acceptable as an alternative apportionment methodology. Therefore, we grant reconsideration of the *AT&T Order* in this regard.

Account 6423 - Buried Cable Expense

23. In its June 30, 1989 revisions, AT&T introduces a "Common" cost pool within this account that would be allocated in proportion to "the respective ratio of forecasted regulated or nonregulated equivalent circuit miles to total forecasted equivalent circuit miles."[43] This apportionment factor is inconsistent with the Commission's requirement that expenses for shared network plant be apportioned on the basis of current relative regulated/nonregulated usage.[44] We therefore require AT&T to file further revisions containing an apportionment factor for this pool that is consistent with that requirement.

III. CONCLUSIONS

24. We have reviewed AT&T's petition for clarification and reconsideration of the *AT&T Order*, AT&T's May 31, 1988 and June 30, 1989 revisions to its cost manual, and the alternative proposed revisions that accompany the May 31, 1988 revisions. We find that AT&T's petition should be granted to the extent indicated above. We also find, subject to the exceptions stated in Part II of this Order, that AT&T revisions are consistent with the Commission's requirements for cost allocation manuals and properly implement the *AT&T Order*, as modified by the partial grant of AT&T's petition. Since the exceptions are very limited in relation to the manual as a whole, we find that AT&T's revisions should be approved, to the extent and subject to the conditions stated in this Order.

IV. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communication's Act of 1934, as amended, 47 U.S.C. §§154(i), 405, that the Petition for Clarification and Reconsideration, filed April 29, 1988, by AT&T IS GRANTED IN PART AND DENIED IN PART as specified in this Order.

26. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communication's Act of 1934, as amended, 47 U.S.C. §154(i), that the May 31, 1988 and the June 30, 1989 revisions to AT&T's Cost Allocation Manual ARE APPROVED, to the extent and subject to the conditions stated in this Order.

27. IT IS FURTHER ORDERED that the revisions required herein shall be filed no later than sixty days from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Reportand Order*, CC Docket 86-111, 2 FCC Rcd 1298 (1987)(*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987)(*Reconsideration Order*), *further recon.*, 3 FCC Rcd 6701 (1988)(*Further Reconsideration Order*), *petition for review pending*, Southwestern Bell Corp. v. FCC, D.C. Circuit No. 87-1764 (filed Dec. 14, 1987).

[2] *American Telephone and Telegraph Co.*, 3 FCC Rcd 143 (Com. Car. Bureau 1988).

[3] American Telephone & Telegraph Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 1786 (Com. Car. Bureau 1988)(*AT&T Order*), *review denied*, 4 FCC Rcd 4849 (1989).

[4] *AT&T Order*, 3 FCC Rcd at 1786, paras. 3-4; *id.* at 1797, paras. 105-06.

[5] AT&T may defer its September 30, 1989 quarterly update, if any, until that date.

[6] *AT&T Order*, 3 FCC Rcd at 1792-93, para. 58; *id.* at 1793, para. 61; *id.*, para. 64; *id.* at 1795, para. 78; *id.* at 1796, para. 91.

[7] AT&T Petition at 3, *citing Reconsideration Order*, 2 FCC Rcd at 6287-88, paras. 36-45.

[8] AT&T Petition at 2-4.

[9] In response to AT&T's request, AT&T Petition at 2, n.*, we clarify that AT&T should compute its general allocator by using the ratio of all expenses, including marketing expenses, directly assigned or attributed to regulated and nonregulated activities. *See* 47 C.F.R. §64.901(b)(3)(iii).

[10] AT&T Initial Manual at 19-20.

[11] *See id.*, Attachment D at 1. Incidental treatment causes an activity's costs and revenues to be apportioned to regulated activities, even though the activity would normally be classified as a nonregulated activity.

[12] *AT&T Order*, 3 FCC Rcd at 1792, para. 50.

[13] AT&T May 31, 1988 Revisions, §V.4 at 3 to 3a.

[14] AT&T Petition at 8-9.

[15] AT&T June 30, 1989 Revisions, §V.4 at 3-4; AT&T May 31, 1988 Revisions, Alternative Proposals, §V.4 at 3.

[16] AT&T Petition at 8.

[17] AT&T Initial Manual at 28.

[18] *AT&T Order*, 3 FCC Rcd at 1793, para. 67.

[19] AT&T Petition at 7; AT&T May 31, 1988 Revisions, Alternative Proposals, §V.6 at 3.

[20] *AT&T Order*, 3 FCC Rcd at 1791, para. 42.

[21] AT&T June 30, 1989 Revisions, §V.10 at 6.

[22] *See* 47 C.F.R. §32.1181; *id.* §32.1191.

[23] *See, e.g.*, U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 195, 206, para. 104 (Com. Car. Bureau 1988) *(U S West Order)*.

[24] AT&T Initial Manual at 32.

[25] *AT&T Order*, 3 FCC Rcd at 1794, para. 71.

[26] AT&T Petition at 5-6.

[27] *AT&T Order*, 3 FCC Rcd at 1794, para. 72.

[28] AT&T Petition at 5.

[29] AT&T Initial Manual at 33.

[30] *AT&T Order*, 3 FCC Rcd at 1794, para. 73.

[31] AT&T Petition at 7-8.

[32] *See* AT&T June 30, 1989 Revisions, §V.1 at 4-5.

[33] *Id.*, §V.12 at 1.

[34] *Id.* at 2.

[35] *Id.*

[36] *See AT&T Order*, 3 FCC Rcd at 1794, para. 73.

[37] *See* para. 17, *supra*.

[38] AT&T Initial Manual at 34-35.

[39] *AT&T Order*, 3 FCC Rcd at 1794, para. 74.

[40] AT&T Petition at 6.

[41] AT&T May 31, 1988 Revisions, Alternative Proposals, §V.12 at 5. AT&T's June 30, 1989 Revisions also proposed this procedure. AT&T June 30, 1989 Revisions, §V.12 at 5;

[42] AT&T June 30, 1989 Revisions, §V.12 at 4-5; AT&T May 31, 1988 Revisions, Alternative Proposals, §V.12 at 4-5.

[43] AT&T June 30, 1989 Revisions, §V.15 at 2. AT&T uses forecasted equivalent circuit miles to apportion its "Common" cost pool within Account 2423 - Buried cable.

[44] *Joint Cost Order*, 2 FCC Rcd at 1320, para. 173; *see also* Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287, 295, para. 76 (Com. Car. Bureau 1988) *(Nevada and Pacific Order)*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Southern New England Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1700

MEMORANDUM OPINION AND ORDER

Adopted: September 13, 1989 Released: September 22, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. In the *Joint Cost Order*,[1] the Commission required certain subject carriers, including the Southern New England Telephone Company (SNET), to file a manual for separating costs of regulated telecommunications services from the costs of nonregulated activities. In response to this requirement, SNET filed a cost allocation manual on September 1, 1987. In our *Memorandum Opinion and Order*[2] released on September 15, 1988, we disapproved this manual and directed SNET to file a revised manual no later than November 14, 1988. SNET filed a revised cost allocation manual on November 9, 1988. This revised manual described SNET's nonregulated activities, listed the activities SNET proposed to treat as incidental activities, and provided information on SNET's affiliate transactions, employee time reporting procedures, and cost apportionment methods.

2. We reviewed the revised manual in the *SNET Order*[3] and found that certain areas of the manual required clarification or revision. Despite these problem areas, we conditionally approved SNET's revised manual. We determined that the manual provided adequate assurances against the misallocation of costs and revenues between regulated and nonregulated activities to permit its implementation on January 1, 1988. We required, however, that SNET submit further revisions addressing each of the specified problem areas. We stated that these revisions would be subject to public comment and our review, and that we would take all appropriate action, including the prescription of specific apportionment procedures, in the event we disapproved any part of the further revised manual.[4]

3. On May 10, 1989, SNET submitted its further revisions, which provide additional information regarding the problem areas identified in the *SNET Order*. According to SNET, these revisions comply fully with that Order.[5] No party commented on these revisions.[6]

II. DISCUSSION

Overall Sufficiency of the Manual

4. Under the *Joint Cost Order*, each cost allocation manual must describe the nonregulated activities, incidental activities, affiliate transactions, employee time reporting procedures and cost apportionment methods of the telephone operating companies that will apply it. In the *SNET Order*, we required SNET to provide additional, and in certain instances, corrected information regarding each of these areas. After reviewing the contents of SNET's further revised manual, we find, subject to one exception discussed below, that it is consistent with the Commission's requirements for cost allocation manuals and properly implements the *SNET Order*. Accordingly, we approve SNET's May 10, 1989 revisions, subject to the filing of additional information and revisions specified herein.

Account 5301 - Uncollectible Revenues - Telecommunications and Account 5302 - Uncollectible Revenues - Other

5. SNET proposes to directly assign all uncollectible revenues in Accounts 5301 and 5302 to regulated and nonregulated activities. We are uncertain as to the relationship between SNET's booked uncollectibles and its mix of regulated and nonregulated services, and how it can directly assign uncollectibles to these accounts. We, therefore, require SNET either to clarify how it assigns uncollectible revenues to pools, or to revise its manual to allocate uncollectible revenues from its telecommunications operation in proportion to its relative telecommunications revenues and other uncollectible revenues in proportion to its relative non-telecommunications revenues.

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the March 28, 1989 and May 10, 1989 revisions to SNET's Cost Allocation Manual ARE APPROVED, subject to the conditions stated in this Order.

7. IT IS FURTHER ORDERED that the revisions required herein shall be submitted no later than October 31, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of costs of regulated telephone service from costs of nonregulated activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on reconsideration*, 2 FCC Rcd 6283 (1987) (*Order on Reconsideration*), *modified on further reconsideration*, 3 FCC Rcd 6701 (1988) (*Further Order on Reconsideration*), *petition for review pending*, Southwestern Bell Corp. v. FCC, D.C. Circuit No. 87-1764 (filed December 14, 1987).

[2] The Southern New England Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 5625 (Com. Car. Bureau 1988) *(SNET Rejection Order)*.

[3] Southern New England Telephone Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 4 FCC Rcd 1400 (Com. Car. Bureau 1989) *(SNET Order)*.

[4] *Id.* at 1400, paras. 2-3; *id.* at 1402, paras. 24-25.

[5] SNET Revised Manual, Cover Letter, dated May 10, 1989.

[6] On March 28, 1989, SNET also filed what it terms "a technical correction and nonsubstantive modification" to its November 5, 1988 revised manual. This modification established a new cost pool, "Contributions - Common" to Account 7370 - Special Charges, with an effective date of March 27, 1989. Although the carrier defined this revision as a "technical correction," it is actually a change to the cost category involving a change in cost pools. As described in paragraph 26 of the *SNET Order*, changes to the cost categories and their allocation mechanisms must be submitted at least 60 days prior to implementation. Consequently, SNET should have made this filing effective on 60 days' notice. Since SNET has made this revision retroactive to January 1, 1988, there is no reason to have SNET revise the effective date. In the future, however, SNET is cautioned to evaluate revisions to its manual more precisely and choose the correct filing period.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 21, 1989

FEDERAL-STATE JOINT BOARD INCLUDES DATA IN CC DOCKET NO. 80-286 FILE

In a letter dated May 24, 1989 from Mr. Michael Wilson, Chief, Cost Analysis Branch to certain Local Exchange Carriers (LECs), the Joint Board requested that the LECs provide 1989 data to be used in the evaluation of alternative allocation factors for Central Office Equipment, Category 3, Local Dial Switching Equipment. The data, which were requested to update previous data submitted in 1986, include the counts of call attempts and switched minutes of use and also include Category 3 investment and revenue requirement.

The Joint Board staff compiled the submitted data into spread sheet format and entered it into the official CC Docket No. 80-286 file.

Persons wishing to review or copy this data may do so during normal business hours in the Commission's Docket Reference Room, 1919 M Street, N.W., Room 239, Washington, D.C. 20054. Copies may also be obtained from the Commission's copy contractor, International Transcription Service, 2100 M Street, N.W., Room 140 Washington, D.C. 20037 (202) 857-3800.

For further information please contact Charles Needy at (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 21, 1989

NECA *et al.* FILE JOINT PETITION FOR WAIVER OF PART 36 RULES REGARDING THE UNIVERSAL SERVICE FUND

PUBLIC COMMENT INVITED

On August 29, 1989, the following Joint Petitioners filed for a waiver of certain sections of the Commission's Part 36 Rules regarding the Universal Service Fund (USF): the National Rural Telecom Association, the National Telephone Cooperative Association, the Organization for the Protection and Advancement of Small Telephone Companies, the United States Telephone Association and the National Exchange Carrier Association, Inc. The Joint Petitioners request a waiver of Sections 36.631(c) and 36.641(b) for calendar years 1990 through 1998 to continue USF payments at the current 1989 levels for the 203 exchange carrier study areas having fewer than 200,000 working loops which would otherwise experience a reduction in high cost assistance funding in 1990. The Joint Petitioners also request that we waive Section 36.611(a) and require carriers to submit USF data on May 1, 1990, rather than on June 30, 1990, to allow additional time for the industry and the regulators to test alternatives to the current USF process.

Interested parties may file comments on the petition no later than **October 16, 1989.** Replies should be filed by **October 31, 1989.** Comments should reference file number AAD 9-1936. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., (ITS) 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-433

In the Matter of

Amendment of Section 73.202(b),	RM-5994
Table of Allotments,	RM-6181
FM Broadcast Stations.	
(Brookville, Punxsutawney,	
Johnsonburg, Indiana and Barnesboro,	
Pennsylvania)[1]	

ORDER TO SHOW CAUSE

Adopted: August 28, 1989; Released: September 22, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the *Request for Supplemental Information*, 3 FCC Rcd 5555 (1988), issued in response to the competing expression of interest in use of Channel 288B1 at Brookville, Pennsylvania, filed by Genas Broadcasting ("Genas"). Genas and Strattan Broadcasting ("Strattan") filed comments.[2] Indiana Broadcasters, Inc. ("Indiana Broadcasters") filed reply comments.

BACKGROUND

2. At the request of Strattan, the Commission issued a *Notice of Proposed Rule Making and Order to Show Cause*, 2 FCC Rcd 6329 (1987), proposing the substitution of Channel 288B1 for Channel 240A at Brookville, Pennsylvania, and the modification of its license for Station WMKX to specify the non-adjacent higher powered channel. The *Order to Show Cause* was directed to Renda as to why its license for Station WPXZ-FM should not be modified to specify operation on Channel 281A in lieu of its present Channel 288A. Genas filed a competing expression of interest in use of Channel 288B1 at Brookville. Renda opposed the modification of its license to the alternate Class A channel and instead counterproposed the modification of its license to specify Channel 288B1 at Punxsutawney.

3. After considering the pleadings filed in response to the *Notice*, we concluded that the public interest would be served by allotting Channel 288B1 to Brookville. We found that Renda's competing proposal to allot Channel 288B1 to Punxsutawney would violate Section 73.315 of the Rules since a transmitter could not be sited so as to provide the entire community with the required line-of-sight service. We additionally noted that the transmitter could also violate Federal Aviation Administration ("FAA") air hazard requirements. Further, we found that Renda had not shown good cause as to why its license for Station WPXZ-FM should not be modified to specify Channel 281A. However, we were unable to modify Strattan's license for Station WMKX at Brookville to specify the non-adjacent Class B1 channel. Section 1.420(g) of the Rules permits the modification of a station's license to a non-adjacent higher class channel if no competing expression of interest is received or there is an additional equivalent class channel available for use by such interested parties. In this case, Genas' expression of interest, although potentially invalid because it did not include a commitment to reimburse Renda, precluded the upgrade. Although Strattan had proposed the allotment of Channel 277B1 as an equivalent class channel to accommodate any expressions of interest, Strattan's proposal required several channel substitutions elsewhere, one of them being the substitution of Channel 228A for Channel 223A at Barnesboro, Pennsylvania, for which an application was pending. Channel 223A was allotted to Barnesboro in the omnibus FM rule making proceeding, MM Docket 84-231. Our review of Strattan's proposal showed that the substitute channel could not be used at the site specified in the pending application of the Bland Group.[3] Therefore, based on policies adopted in Docket 84-231 barring substitutions for Docket 84-231 allotments if the substitute channel does not meet spacing requirements at the sites specified by the applicants for the allotment, we found that there was no additional equivalent class channel available for allotment at Brookville. However, this policy was recently overturned by the Court of Appeals. *See Reeder v. FCC*, Case No. 1045 (slip op. January 24, 1989). Accordingly, this policy will no longer be applied in this proceeding, and it is now necessary to consider the alternative channel. In addition, in a *Request for Supplemental Information*, we asked Genas to clarify its intent on the issue of reimbursement.

THE PLEADINGS

4. Genas states that it will reimburse Renda for the costs associated with its station's channel change, consistent with the policy enunciated in *Circleville, Ohio*, 8 FCC 2d 159 (1967). Strattan, in its comments, again urges the allotment of Channel 277B1 to Brookville as an additional equivalent class channel. Noting the problem with the Barnesboro substitution, it appends an agreement with the Bland Group, Inc., permittee of Station WRHB, Channel 233A, at Barnesboro, in which the permittee agrees to the modification of its construction permit to specify Channel 228A and relocation of its transmitter to a site which will comply with the Commission's minmum distance separation requirements. Therefore, Strattan again requests that Channel 277B1 be allotted to Brookville by substituting Channel 263A for unoccupied but applied for Channel 277A at Johnsonburg, Pennsylvania,[4] substituting Channel 228A for Channel 223A at Barnesboro, Pennsylvania, and substituting Channel 233A for Channel 276A at Indiana, Pennsylvania, with the modification of Indiana Broadcasters' license for Station WQMU accordingly.[5,6] Strattan states that it will reimburse Indiana Broadcasters for the costs associated with its change of channel.

5. Indiana Broadcasters opposes the modification of its license for Station WQMU to specify Channel 223A in lieu of its present Channel 276A. According to Richard M. Sherry, president and general manager of Station WQMU, the station attaches extraordinary importance to its identification with its present frequency. He believes that the station may be irreparably harmed if required to change channel. Indiana Broadcasters recognizes that the Commission generally does not protect a station's interest

in remaining on its allotted channel. However, it believes that these determinations have been made on the basis of the presumed net service gains resulting from an upgrade, citing *Broken Arrow and Bixby, Oklahoma*, 3 FCC Rcd 6507 (1988). In this case, it believes that the Commission is faced with the possibility of a net loss of service based upon the diminished viability of Station WQMU if unable to continue to identify itself as "103", its present frequency. Thus, it believes that this case is easily distinguishable from the more common situation where substituted frequencies are fungible for all intents and purposes. Indiana Broadcasters goes on to state that the Commission has recognized the investment which licensees have in their station's identification and the importance of preserving these investments, citing *Call Sign Assignments for Broadcast Stations*, 2 FCC Rcd 6681, 6683 (1987).

DISCUSSION

6. We believe the public interest would be served by proposing the allotment of Channel 277B1 to Brookville as an additional equivalent class channel for use by Genas and other interested parties. The Commission tentatively rejected the use of that channel because of the Commission's policy concerning the substitution of channels allotted in MM Docket 84-231. However, as stated in para. 3, *supra*, this policy is no longer applicable in light of the decision by the Court of Appeals in *Reeder v. FCC*. Further, Strattan has obtained an agreement from the permittee of the Barnesboro station to change channel and relocate its transmitter so as to avoid a short-spacing to Station WBZZ at Pittsburgh, Pennsylvania. We also believe that Indiana Broadcasters has not presented sufficient reason to warrant denial of the allotment at Brookville. We disagree with Indiana Broadcasters that the situation here is distinguishable from that in *Broken Arrow and Bixby, Oklahoma, supra*, and cases cited therein. As stated in *Broken Arrow and Bixby, Oklahoma, supra*, "the Commission has held on numerous occasions that the substitution of an existing station's channel at one community served the public interest where the substitution permitted the provision of a new or expanded service at another community." Here, the substitution of channels at Indiana could permit Brookville and its environs to benefit from both an expanded service by Station WMKX on Channel 288B1 and the provision of a new wide area service by a station operating on Channel 277B1. *See, Onawa, Iowa, and Vermillion, South Dakota*, 4 FCC Rcd 703 (1989). However, we are issuing this *Order to Show Cause* to provide Indiana Broadcasters with a further opportunity to present any evidence which may give rise to a substantial and material question of fact which would warrant a hearing on the modification of its license for Station WQMU to specify operation on Channel 233A in lieu of its present Channel 276A.

7. Counterproposals to the allotment of Channel 277B1 at Brookville will not be considered since an opportunity for the filing of counterproposals in this proceeding has already been provided. The Bland Group, permittee of Station WRHB, Barnesboro, is deemed to have consented to the modification of its permit to specify Channel 228A and to relocate its transmitter to a non-conflicting site by the agreement which it has entered into with Strattan and submitted in Strattan's comments. Therefore, we are not issuing an Order to Show Cause to the Bland Group. Further, if Channel 263A is substituted for Channel 277A at Johnsonburg, Strattan Broadcasting would be required to amend its pending application to specify the new channel without loss of cut-off protection.

8. We believe the public interest will be served by proposing the allotment of Channel 277B1 and the substitution of Channel 288B1 for Channel 240A at Brookville, Pennsylvania, since it could enable Station WMKX to expand its coverage area and permit the initiation of a second local wide-area coverage FM service. Accordingly, we propose to amend Section 73.202(b), the FM Table of Allotments, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Barnesboro, Pennsylvania	233A	228A
Brookville, Pennsylvania	240A	277B1, 288B1
Indiana, Pennsylvania	276A	233A
Johnsonburg, Pennsylvania	277A	263A
Punxsutawney, Pennsylvania	288A	281A

9. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Indiana Broadcasters, Inc., licensee of Station WQMU, Indiana, Pennsylvania, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 233A as proposed herein instead of the present Channel 276A.

10. Pursuant to Section 1.87 of the Commission's Rules, Indiana Broadcasters may, not later than **November 16, 1989,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Indiana Broadcasters to furnish additional information. If Indiana Broadcasters raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date refered to above, Indiana Broadcasters will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

11. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensee of Station WQMU, and the applicant for Channel 277A at Johnsonburg, as follows: Indiana Broadcasters, Inc., P.O. Box 68, Indiana, Pennsylvania 15701; Strattan Broadcasting, 51 Pickering Street, Brookville, Pennsylvania 15825.

12. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached

Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

13. Interested parties may file comments on or before **November 16, 1989,** and reply comments on or before **December 1, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert L. Olender, Esq.
Baraff, Koerner, Olender & Hochberg, P.C.
2033 M Street, N.W., Suite 203
Washington, D.C. 20036
(Counsel to Strattan)

14. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

15. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The communities of Johnsonburg, Indiana and Barnsboro, Pennsylvania, have been added to the caption.

[2] Renda Radio, Inc. ("Renda") filed a Motion to Strike Strattan's comments, a Petition to Hold Proceeding in Abeyance and Supplementary Submission. Strattan filed Oppositions to each of the pleadings. The Commission's Rules do not contemplate the filing of pleadings beyond comments and reply comments. We believe that the public interest would not be served by accepting these pleadings since they provide no information of decisional significance. In addition, Renda's Petition to Hold Proceeding In Abeyance is denied. The petition notes that a separate Commission proceeding, MM Docket 88-526, might result in a rule change which would allow Renda to submit a proposal that would better serve the public interest from those presently under consideration. However, any petition which Renda might file seeking to move its station from Punxsutawney to Brookville and simultaneously upgrade to Channel 288B1 under the rules recently adopted in MM Docket 88-526, would constitute an untimely counterproposal to this proceeding.

[3] The Bland Group's application for a construction permit for Station WRHB was granted on June 10, 1988.

[4] Strattan Broadcasting filed an application for Channel 277A at Johnsonburg on May 4, 1989 (ARN-890504MD).

[5] The coordinates for Channel 263A at Johnsonburg are North Latitude 41-29-24 and West Longitude 78-40-36. Channel 263A at Johnsonburg can also be used at the site specified in Strattan's pending application, North Latitude 41-23-03 and West Longitude 78-41-25. The coordinates for Channel 228A at Barnesboro are North Latitude 40-40-00 and West Longitude 78-49-00. The coordinates for Channel 233A at Indiana are North Latitude 40-38-17 and West Longitude 79-08-47. The coordinates for Channel 277B1 at Brookville are North Latitude 41-02- 12 and West Longitude 79-06-06.

[6] This proposal complies with the Commission's policy of accepting proposals for consideration which require no more than two other substitutions of channels occupied by existing FM stations. *See, Columbus, Nebraska, et al,* 51 Fed. Reg. 4926, published February 10, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-404

In the Matter of

Amendment of Section 73.202(b), RM-6895
Table of Allotments,
FM Broadcast Stations.
(Greenwood, South Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 24, 1989; Released: September 22, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by United Community Enterprises, Inc. (petitioner) requesting the substitution of Channel 278C3 for Channel 278A at Greenwood, South Carolina, and the modification of its permit for Station WMTY-FM to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 278C3 can be allotted to Greenwood in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.8 kilometers (3.0 miles) southeast to avoid a short-spacing to Station WRIX-FM, Channel 276A, Honea Path, South Carolina, and to Channel 277A at Greer, South Carolina, which is unoccupied but applied for.[1] As requested, we are also proposing to modify petitioner's construction permit for Station WMTY-FM to specify operation on Channel 278C3. In accordance with Section 1.420 of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 278C3 at Greenwood or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 278C3 for Channel 278A at Greenwood, South Carolina, since it could enable Station WMTY-FM to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Greenwood, South Carolina	244A, 278A	244A, 278C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 16, 1989,** and reply comments on or before **December 1, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lawrence J. Bernard, Jr., Esq.
Ward & Mendelsohn, P.C.
1100 17th Street, N.W., Suite 900
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See* Certification *That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-09-28 and West Longitude 82-07-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-405

In the Matter of

Amendment of Section 73.202(b),	RM-6818
Table of Allotments,	
FM Broadcast Stations.	
(Elizabethton, Tennessee)	

NOTICE OF PROPOSED RULE MAKING

Adopted: August 28, 1989; Released: September 22, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Eaton P. Govan, III and Burton B. Cagle, Jr. (petitioner), licensee of Station WUSJ-FM, Channel 257A, Elizabethton, Tennessee, requesting the substitution of Channel 257C3 for Channel 257A at Elizabethton, and the modification of the station's license accordingly. The proposal could provide the community with its first wide coverage area FM service. Petitioner states an interest in constructing the improved facilities, if authorized.

2. Channel 257C3 can be allotted to Elizabethton in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.7 kilometers (9.1 miles) northeast of the city.[1] Petitioner indicates a willingness to relocate the station's current transmitter site.

3. As requested, we shall propose to modify the license of Station WUSJ-FM to specify operation on the higher class co-channel, Channel 257C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Elizabethton.

4. In view of the fact that Elizabethton, Tennessee, could receive its first wide coverage area FM station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Elizabethton, Tennessee	257A	257C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 16, 1989,** and reply comments on or before **December 1, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Lawrence J. Bernard, Jr., Esquire
Ward & Mendelsohn, P.C.
1100 17th Street, N.W.
Suite 900
Washington, D.C. 20036
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The restricted site coordinates specified by the petitioner are 36-26-57 and 82-06-31.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-406

In the Matter of

Amendment of Section 73.202(b), RM-6745
Table of Allotments,
FM Broadcast Stations.
(Grenada and Artesia, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 24, 1989; Released: September 22, 1989

By the Chief, Allocations Branch:

1. Before the Commission is a petition for rule making filed jointly by Chatterbox, Inc. (Chatterbox), licensee of Station WQXB(FM), Grenada, Mississippi, and WYS Incorporated (WYS), licensee of Station WZIX(FM), Artesia, Mississippi. Chatterbox requests the substitution of FM Channel 261C2 for 261A at Grenada, Mississippi, and modification of the license for Station WQXB(FM) accordingly. WYS proposed the substitution of FM Channel 260C2 for Channel 261A at Artesia, Mississippi, and modification of its construction permit for Station WZIX(FM) to specify operation on the Class C2 Channel.

2. In support of the proposal, petitioners state that the substitution of Channels at Grenada and Artesia will permit improved service by both stations to their respective communities.

3. Channel 261C2 can be allotted to Grenada, Mississippi, in compliance with the minimum distance separation requirements of the Commission's Rules at the site specified by Chatterbox.[1] In accordance with Section 1.420(g) of the Commission's Rules, we shall propose the modification of the license for Station WQXB(FM). Channel 260C2 can be allotted to Artesia, Mississippi, in compliance with the minimum distance separation requirements at the site specified by WYS.[2] As requested, we shall propose to modify the construction permit (BPH-841012AN) for Station WZIX(FM) to specify operation on Channel 260C2 in accordance with Section 1.420(g) of the Commission's Rules.

4. In view of the above, the Commission believes the public interest would be served by proposing the requested channel substitutions. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the Communities listed below:

	Channel No.	
City	Present	Proposed
Artesia, Mississippi	261A	260C2
Grenada, Mississippi	261A	261C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 16, 1989,** and reply comments on or before **December 1, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Kevin C. Boyle
Latham & Watkins
1001 Pennsylvania Ave., N.W.
Suite 1300
Washington, D.C. 20004
(Counsel for Chatterbox, Inc.
and special counsel for WYS, Incorporated)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 & 604 of the Regulatory Flexibilty Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 261C2 at Grenada are 33-43-08 and 90-01-56. There is a short spacing to Station WZIX(FM), Channel 261A, Artesia, Mississippi, which will be removed when Station WZIX(FM) amends to specify operation on Channel 260C2.

[2] The coordinates for Channel 260C2 at Artesia are 33-41-00 and 88-36-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-407

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Lexington, Mississippi)	RM-6890

NOTICE OF PROPOSED RULE MAKING

Adopted: August 24, 1989; Released: September 22, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petitioner for rule making filed by Fanny T. Cothran (petitioner) requesting the substitution of FM Channel 273C3 for Channel 273A at Lexington, Mississippi. Petitioner also requests modification of her construction permit (BPH 870709MH) for Station WDLG, Channel 273A, to specify Channel 273C3.

2. We believe petitioner's proposal warrants consideration. Channel 273C3 can be allotted to Lexington, Mississippi, in compliance with the minimum distance separation requirements of the Commission's Rules at the petitioner's specified site.[1] We shall also propose to modify the construction permit of Station WDLG, Channel 273A, to specify operation on Channel 273C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for the Lexington, Mississippi area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission Rules, as follows:

	Channel No.	
City	Present	Proposed
Lexington, Mississippi	273A, 292A	273C3, 292A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 16, 1989** and reply comments on or before **December 1, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Leonard S. Joyce
Blair, Joyce & Silva
1825 K Street, N.W.
Washington, D.C. 20006
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 273C3 at Lexington are 33-09-06 and 90-07-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-408

In the Matter of

Amendment of Section 73.202(b), RM-6838
Table of Allotments,
FM Broadcast Stations.
(Branson, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 28, 1989; Released: September 22, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Turtle Broadcasting Company of Branson (petitioner), requesting the substitution of FM Channel 292C3 for Channel 292A at Branson, Missouri. Petitioner also requests modification of its license for Station KRZK, Channel 292A, to specify operation on Channel 292C3.

2. We believe petitioner's proposal warrants consideration. Channel 292C3 can be allotted to Branson, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules at the petitioner's specified site, 15.8 kilometers north of the community,[1] provided channel substitutions are made at Bolivar and Cabool, Missouri.[2] Channel 292C3 is short spaced to Channel 292A, Station KYOO-FM, Bolivar, Missouri, and Channel 292A, Station KOZX, Cabool, Missouri. Station KYOO-FM was upgraded to Channel 290C2 in MM Docket 88-64 and Station KOZX was ordered to Channel 251A in MM Docket 86-410. *See* 3 FCC Rcd 4314 (1988); 4 FCC Rcd 601 (1988). Since the allotment at Branson is contingent on the stations at Bolivar and Cabool being licensed on the new channels, final action in this proceeding may be delayed until the license grants occur. We shall propose to modify the license of Station KRZK, Channel 292A, to specify operation on Channel 292C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for the Branson, Missouri area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Branson, Missouri	292A	292C3

4. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Notice* by Certified Mail, Return Receipt Requested, to the following:

Tom L. Mason,
President &
General Manager
Radio Station
KVVC(FM)
KVVC Broadcasting, Inc.
Box 514
Junction M and Business
Route 60
Cabool, Missouri 65689

Melvin Pulley
KYOO Broadcasting Co.
304 East Jackson
Bolivar, Missouri
65613

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 16, 1989,** and reply comments on or before **December 1, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Roderick W. Orr, President
Orr & Earls Broadcasting, Inc.
Turtle Broadcasting Co. of Branson, L.P.
P.O. Box 486
Branson, Missouri 65616

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 292C3 are 36-47-00 and 93-12-00.

[2] The coordinates for Channel 292C3 are 36-47-00 and 93-12-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

STARTEC INCORPORATED — File No. I-T-C-89-099

Application for authority to acquire and operate facilities and to resell services for provision of various international services.

ORDER AUTHORIZATION AND CERTIFICATE

Adopted: September 13, 1989 Released: September 22, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on March 31, 1989, by Startec Inc., requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for the provision of direct service to Italy, Israel, Kenya, India, Iran, Saudi Arabia, Pakistan, Sri Lanka, South Korea and the United Arab Emirates (UAE), and to resell the services of other common carriers for the provision of switched voice, telex, facsimile and other data services, and for the provision of INTELSAT Business Services (IBS) and international television service to various overseas points. The application was placed on public notice on May 3, 1989. No comments were received. Startec is a corporation organized under the laws of the State of Maryland.

2. In recent authorization of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2] With respect to the resale portion of Startec's application, we note that the majority of international resale applications granted by the Commission involve resale of switched voice services for the provision of switched voice services. In addition to that authority, Startec also seeks authority to provide facsimile, and other data services via reselling the switched voice services of other carriers, and to provide telex service by the resale of telex service of another carrier. We will limit the authority of Startec to resell the services of other carriers for the provision of facsimile, telex and other data services to the points specified in the Appendix. Where the service being provided is the same as the underlying service resold, there is likely to be little or no effect on the foreign correspondent of the U.S. carrier whose service is being resold. However, the resale of one service to provide another could present an entirely different situation. In such a case, additional action or different equipment may be required by the foreign correspondent and consequently, it is possible that operating agreements will be necessary in such cases.[3]

3. We would also note that in its *International Competitive Carrier* decision, the Commission found that each foreign country constituted a separate geographical market.[4] The Commission indicated that this finding was based primarily on the need for a carrier to obtain an operating agreement prior to providing service to a given country.[5] The Commission further found that non-dominant carriers should be required to obtain an initial Section 214 certificate to provide a given service product to a country.[6] Because U.S. resale carriers which provide international services different from the international services being resold may need to obtain operating agreements or other forms of authority from the correspondents or other authorities in the countries where the service will be provided, we believe it is appropriate that such resale carriers be granted initial Section 214 certifications to each country (geographical market) for each service product in accordance with the procedure set forth in the Commission's *International Competitive Carrier* decision.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require grant of the application.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-89-099 IS GRANTED, and Startec is authorized to:

a. lease from Comsat and operate a total of 120 voice-grade satellite circuits, 108 voice-grade circuits between an appropriate earth station on the east coast of North America and an appropriate satellite over the Atlantic Ocean and 12 voice-grade circuits between an appropriate earth station on the west coast of the United States mainland and an appropriate satellite over the Pacific Ocean;

b. lease and operate 108 voice-grade circuits in the appropriate east coast earth station and 12 voice-grade circuits in the west coast earth station;

c. lease and operate domestic connecting facilities between the east and west coast earth stations and Startec's McLean, Virginia office and a one-half interest in any necessary overseas connecting facilities; and

d. use the said facilities in a, b and c above to provide Startec's regularly authorized services between the U.S. and the following points and beyond:

Country	Satellite	No. of Circuits
Italy	AOR	12
Israel	AOR	12
Kenya	AOR	12
India	AOR	12
Iran	AOR	12
Saudi Arabia	AOR	12
Sri Lanka	AOR	12
Pakistan	AOR	12
South Korea	POR	12
UAE	AOR	12

e. lease from Comsat channels of communications between any earth station that may be licensed for provision of IBS and/or television service in the future, including existing earth stations and INTELSAT Atlantic and Pacific Ocean satellites for the provision of IBS and associated digital video services and international television service between the U.S. mainland and those countries which are or hereafter will be listed in Comsat's tariff provisions for the space segment component of IBS and/or

television service. Provided, however, this blanket Section 214 authorization is without commitment as to the Commission's action on any IBS or television Title III application that Startec may file in the future;

f. provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and those points listed in those tariffs;

g. provide international facsimile and other data services by the resale of international switched voice services set forth in the AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and those points listed in the Appendix; and

h. provide international telex service by the resale of the International Telex Service set forth in ITT's Tariff F.C.C. No. 12, between the U.S. and those points listed in the Appendix.

6. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

7. Nothing in this authorization should be construed as authorizing the transmission of money. The transmission of money is not considered to be a common carrier service.

8. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

9. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

10. IT IS FURTHER ORDRED that the applicant shall file the circuit addition reports required by Section 63.10(b) of the Commissions's Rules, 47 C.F.R. §63.01(b) (October 1, 1988) for any additional circuits acquired. The applicant need not file Section 63.10 reports for services provided by means of the resale of other carriers' services as it is reselling services rather than acquiring specific facilities.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Afghanistan	Albania
Algeria	American Samoa
Andorra	Angola
Anguilla	Antartica (Casey Bay)
Antigua (Barbados)	Argentina
Aruba	Ascension Island
Australia (Tasmania)	Austria
Bahamas, The	Bahrain
Bangladesh	Barbados
Belgium	Belize
Benin	Bermuda
Bhutan	Bolivia
Botswana	Brazil
British Virgin Islands	Brunei
Bulgaria	Burkina Faso
Burma	Burundi
Caicos Island	Cambodia
Cameroon	Canada
Cape Verde Islands	Chile
China (PRC)	Colombia
Costa Rica	Cyprus
Czechoslovakia	Denmark (including Faeroe Island)
Dominica	Dominican Republic
East Germany	Ecuador
Egypt	El Salvador
Ethiopia	Federated States of Micronesia
Fiji Island	Finland
France	French Antilles (Martinique,
French Guiana	St. Barthelemy & St. Martin)
French	Polynesia Gabon
Gambia, The	Ghana
Gibraltar	Greece
Greenland	Grenada/Carriacou
Guadeloupe	Guam
Guantamana	Guatamala
Guinea	Guinea-Bissau
Guyana	Haiti
Honduras	Hong Kong
Hungary	Iceland
India	Indonesia
Iran	Ireland
Israel	Italy
Ivory Coast	Jamaica
Japan	Jordan
Kenya	South Korea
Kuwait	Liechtenstein
Liberia	Libya
Luxembourg	Macao
Madagascar	Malawi
Malaysia	Maldives
Mali	Malta
Mauritania	Mauritius
Marshall Islands (Majuro, Ebeye)	Mexico
Monaco	Mongolia
Montserrat	Morocco
Nauru	Nepal
Netherlands	Netherlands (Antilles)
Nevis	New Caledonia
New Zealand	Nicaragua
Niger	Nigeria
North Yemen	Northern Ireland
Norway	Oman
Pakistan	Panama
Papau New Guinea	Paraguay
Philippines	Poland
Portugal (Azores, Madeira Island)	Qatar
Romania	St. Kitts
St. Lucia	St. Pierre/Miquelon, St. Vincent
San Marino	and the Grenadines

Sao Tome & Principe	Saipan (Rota and Tinian)
Saudi Arabia	Scotland
Senegal	Singapore
South Africa	Soviet Union
Spain (Balearic Is., Canary Is.,	Sri Lanka
Ceuta & Melilla)	Sudan
Suriname	Swaziland
Switzerland	Sweden
Taiwan	Tanzania
Thailand	Trinadad & Tobago
Tonga	Tunisia
Turkey	Turks Island
Uganda	United Arab Emirates
United Kingdom	Uraguay
Vatican City	Venezuela
Vietnam	South Yemen
Yugoslavia	Zaire
Zambia	Zimbabwe

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

[3] For example, in a Memorandum Opinion and Order, File No. I-T-C-84-081, (released July 3, 1984), the Commission, by delegated authority, granted Instafax International, Inc. (Instafax) authority to provide digital facsimile services to Hong Kong by resale of AT&T's International Message Telecommunications Service. The Order stated that Instafax indicated that it had conducted preliminary discussions with Cable and Wireless (Hong Kong) Ltd., a prospective foreign correspondent in Hong Kong. On July 12, 1984, Instafax filed pursuant to the provisions of Section 43.51 of the Commission's Rules, 47 C.F.R. Section 43.51, copies of: a Business Registration Certificate issued by the Government of Hong Kong; a Public Non-Exclusive Telecommunications Service License granted by the Office of the Postmaster General of Hong Kong; and an operating agreement between Instafax and Cable and Wireless (Hong Kong) Ltd.

[4] *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985). Order on Reconsideration, 50 RR 2d 1435 (1986).

[5] *Id.* at 828.

[6] *Id.* at 844.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Editorial Amendments to Part 80
of the Rules Concerning the
Maritime Radio Services.

ORDER

Adopted: September 13, 1989 Released: September 22, 1989

By the Chief, Private Radio Bureau:

1. This Order amends Part 80 of the Commission's Rules 47 C.F.R. Part 80, governing the maritime radio services. These rule amendments correct typographical errors and omissions, update references, conform these rules to other rules and revise wording to clarify the affected sections. Because these amendments are non-substantive, the notice and comment provisions and the effective date requirements of the Administrative Procedure Act are inapplicable. *See* 5 U.S.C. 553(b) and (d), 47 C.F.R. § 1.412(b) and 47 C.F.R. § 1.427(b).

2. Because a Notice of Proposed Rule Making is not required, the Regulatory Flexibility Act, P.L. 93-354, does not apply.

3. Authority for this action is contained in Section 4(i), 5(c)(1) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 155(c)(1) and 303(r) and by Section 0.331(a)(1) of the Commission's Rules, 47 C.F.R. § 0.331(a)(1).

4. Accordingly, IT IS ORDERED that Part 80 of the Commission's Rules is amended as set forth in the attached Appendix, effective upon publication in the Federal Register.

FEDERAL COMMUNICATIONS

Ralph A. Haller
Chief, Private Radio Bureau

AMENDED RULES

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 80 - STATIONS IN THE MARITIME SERVICES

1. The authority citation for Part 80 continues to read:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 stat. 1064 - 1068, 1081 - 1105, as amended; 47 U.S.C. 151 - 155, 301 - 609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

Part 80 [Amended]

2. In the table of contents, the undesignated center heading appearing before § 80.311 is revised to read as follows: "Distress, Alarm, Urgency and Safety Procedures."

§ 80.153 [Amended]

3. In § 80.153, paragraph (c)(2) is revised to read, "An operational fixed station associated with a coast station may be operated by the operator of the associated coast station."

§ 80.159 [Amended]

4. In § 80.159, paragraph (c)(2) is revised to read, "Where the station power exceeds 1500 watts peak envelope power, the operator must hold a general radiotelephone radio operator license or higher class license." and paragraph (d)(2) is revised to read, "Where the station power exceeds 250 watts carrier power or 1500 watts peak envelope power, the radio operator must hold a general radiotelephone operator license or higher class license."

§ 80.169 [Amended]

5. In § 80.169, paragraph (a) is revised to read, "All adjustments of radio transmitters in any radiotelephone station or coincident with the installation, servicing, or maintenance of such equipment which may affect the proper operation of the station, must be performed by or under the immediate supervision and responsibility of a person holding a first or second class radiotelegraph operator's certificate or a general radiotelephone operator license."

§ 80.201 [Revised]

6. § 80.201 is revised to read, "This subpart gives the general technical requirements for the use of frequencies and equipment in the maritime services. These requirements include standards for equipment authorization, frequency tolerance, modulation, emission, power and bandwidth. Reference to any CCIR recommendation in this part is the most recent CCIR approved recommendation that does not prevent the use of existing equipment."

§ 80.207 [Amended]

7. In § 80.207, paragraph (a)(1) is revised to read, "That these signalling techniques, other than digital selective calling, are not used on frequencies designated for general purpose DSC calling and distress and safety DSC calling as listed in § 80.359(a) and (b)."

§ 80.211 [Amended]

8. In § 80.211, the introductory text in paragraph (b) is revised to read, "For transmitters operating in the band 1626.5 - 1646.5 MHz. In any 4 kHz band the mean power of emissions shall be attenuated below the mean output power of the transmitter as follows:"

§ 80.213 [Amended]

9. In § 80.213, paragraph (a)(2) is revised to read, "When phase or frequency modulation is used in the 156-162 MHz and 216-220 MHz bands the peak modulation must be maintained between 75 and 100 percent. A frequency deviation of + 5 kHz is defined as 100 percent peak modulation; and"

§ 80.215 [Amended]

10. In § 80.215, paragraph (d)(2)(iii) is revised to read, "All ships - Open waters; 4000-27500 kHz - 1.5kW[5]"

§ 80.221 [Amended]

11. In § 80.221, paragraph (b)(1) is revised to read, "The frequency tolerance of each tone must be + 1.5 percent;"

§ 80.225 [Redesignated]

12. In § 80.225, paragraph (b) is removed and paragraphs (c) through (f) are redesignated as (b) through (e), respectively.

§ 80.363 [Amended]

13. In § 80.363, the introductory text is revised to read, "The non-paired frequencies with F1C, F3C, J2C or J3C emission which are assignable to ship and public coast stations for facsimile are as follows:" The frequency chart in paragraph (a) is amended to add carrier frequency 2073.1 to the column designated Series No. 1 before carrier frequency 4159.2, correct carrier frequency 6327.2 in the column designated Series No. 1 to read 6237.2 and to add carrier frequency 2071.1 to the column designated Series No. 2 before carrier frequency 2075.1. Additionally, paragraph (b) is revised to read, *"Public coast station frequencies.* Frequencies in the 2000-27500 kHz bands listed in Part 2 of the Commission's rules as available for shared use by the maritime mobile service and other radio services are assignable to public coast stations for facsimile."

§ 80.373 [Amended]

14. In § 80.373, revise table in paragraph (f) to add footnote designator 13 following Channel designator 15, and to add footnote 13 to read, "Available for assignment to coast stations, the use of which is in accord with an agreed program, for the broadcast of information to ship stations concerning the environmental conditions in which vessels operate, *i.e.*, weather; sea conditions; time signals; notices to mariners; and hazards to navigation." Also footnote 3 of paragraph (f) is revised to read, "156.550 MHz, 156.600MHz and 156.700 MHz are available in U.S. Coast Guard designated port areas only for VTS communications and in the Great Lakes available primarily for communications relating to the movement of ships in sectors designated by the St. Lawrence Seaway Development Corporation or the U.S. Coast Guard. The use of these frequencies outside VTS and ship movement sector protected areas is permitted provided they cause no interference to VTS and ship movement communications in their respective designated sectors."

§ 80.381 [Amended]

15. In § 80.381, revise the table to delete footnote designator 1 where appearing, and delete footnote 1.

§ 80.409 [Amended]

16. In § 80.409, paragraph (f)(1) is revised to read, "Radiotelephony stations subject to Parts II and III of Title III of the Communications Act and/or the Safety Convention must record entries indicated by paragraphs (e)(1) through (e)(11) of this section."

17. § 80.559 is amended by revising paragraph (c) and by adding footnote 1 to read as follows:

§ 80.559 Licensing limitations.

* * * * *

(c) Stations located between 16 km (10 miles) and 128 km (80 miles) of a TV transmitter operating on either Channel 4 or 5, or from the post office of a community in which either channel is assigned but not in operation, are secondary to TV operations within the Grade B service contour.[1]

§ 80.871 [Amended]

18. In § 80.871, paragraph (a) is revised to read, "All passenger ships irrespective of size and all cargo ships of 300 gross tons and upwards subject to Part II of Title III of the Communications Act or to the Safety Convention are required to carry a VHF radiotelephone station complying with this subpart. Ships subject only to the Communications Act may use a VHF radiotelephone installation meeting the technical standards of the Bridge-to-Bridge Act to satisfy the watch requirements of § 80.305(a)(3) if the equipment can transmit and receive on 156.800 MHz. Additionally, the table in paragraph (d) is revised to correct the ship station transmitting frequency for channel designator 24 to read, "157.200", and the coast station transmitting frequencies for channel designators 21, 81, 23 and 83 to read, "161.650, 161.675, 161.750 and 161.775", respectively.

§ 80.911 [Amended]

19. § 80.911 is amended by adding paragraph (d)(5) to read, "For primary supply voltages, measured in accordance with the procedures of this paragraph, greater than

11.5 volts, but less than 12.6 volts, the required transmitter output power shall be equal to or greater than the value calculated from the formula

$$P = 4.375 (V) - 35.313$$

where V equals the measured primary voltage and P is the calculated output power in watts."

Subpart W [Revised]

20. In the table of contents and in the text, the title of Subpart W immediately following § 80.1061 is revised to read, **"Global Maritime Distress and Safety System (GMDSS) - [Reserved]".**

FOOTNOTE FOR APPENDIX

[1] OET Bulletin No. 67, March 1988, entitled "Potential Interference from Operational Fixed Stations in the 72-76 MHz Band to Television Channels 4 and 5" describes an analytical model that can be used to calculate the potential interference that might result from a given fixed station operation. Copies of the bulletin may be obtained from the Commission's current duplication contractor. Information concerning the current duplication contractor may be obtained from the Office of Public Affairs, Consumer Assistance and Small Business Division, Telephone (202) 632-7000.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Sections
1.115(d) and (f) of the
Commission's Rules

ORDER

Adopted: September 13, 1989 Released: September 22, 1989

By the Managing Director:

1. In *Ronald F. Trinchitella*,[1] the Commission recently clarified that section 1.115(f)'s prohibition on the filing of replies in response to oppositions to applications for review except when requested by the Commission only applies to replies to oppositions to applications for review of final decisions of the Review Board. The Commission noted that the decision adopting the language in question expressly indicated that the prohibition only applied "to Review Board final decisions."[2] The Commission also noted that section 1.115(d) authorizes the filing of reply pleadings.[3] This *Order* amends sections 1.115(d) and (f) to reflect more clearly the Commission's intent when it promulgated those provisions.

2. Section 1.115(d) is being amended to reflect when replies may be filed. Section 1.115(f), as modified, will only contain the technical requirements for applications for review and related pleadings, such as page length, service of copies, and where to file them. Furthermore, section 1.115(f) is being slightly restructured to distinguish between the requirements governing the initial filings relative to an application for review and the subsequent requirements governing briefs and reply briefs that may be requested after the Commission grants review of a Review Board final decision.

3. Accordingly, IT IS ORDERED THAT sections 1.115(d) and (f) of the Commission's rules ARE AMENDED, as provided in the Appendix, pursuant to the authority contained in section 0.231(d) of the Commission's rules.

4. A notice and comment proceeding is not required in this instance because sections 1.115(d) and (f) are rules of agency procedure and practice. *See* 5 U.S.C. § 553(b)(A).

5. This amendment will be effective upon publication in the Federal Register. *See* 5 U.S.C. § 553(d).

FEDERAL COMMUNICATIONS COMMISSION

Alan R. McKie
Acting Managing Director

APPENDIX

47 C.F.R. Part 1 is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. 47 C.F.R. Sections 1.115(d) and (f) are revised to read as follows.

§ 1.115 Application for review of action taken pursuant to delegated authority.

* * * * *

(d) Except as provided in paragraph (e) of this section, the application for review and any supplement thereto shall be filed within 30 days from the date of public notice of such action, as that date is defined in § 1.4(b) of these rules. Oppositions to the application shall be filed within 15 days after the application for review is filed. When permitted, replies to oppositions shall be filed within 10 days after the opposition is filed and shall be limited to matters raised in the opposition. Replies to oppositions to applications for review of final decisions of the Review Board may be filed only if the Commission requests a reply; except as provided in § 1.115(e)(3), replies to oppositions to all other applications for review are permissible.

* * * * *

(f)(1) Applications for review, oppositions, and replies shall conform to the requirements of §§ 1.49, 1.51, and 1.52, and shall be submitted to the Secretary, Federal Communications Commission, Washington, D.C. 20554. Except as provided below, applications for review and oppositions thereto shall not exceed 25 double-spaced typewritten pages. Applications for review of final decisions of the Review Board and oppositions thereto shall not exceed 10 double-spaced typewritten pages. Applications for review of interlocutory actions in hearing proceedings (including designation orders) and oppositions thereto shall not exceed 5 double-spaced typewritten pages. When permitted *(see* § 1.115(d)), reply pleadings shall not exceed 5 double-spaced typewritten pages. The application for review shall be served upon the parties to the proceeding. Oppositions to the application for review shall be served on the person seeking review and on parties to the proceeding. When permitted *(see* § 1.115(d)), replies to the opposition(s) to the application for review shall be served on the person(s) opposing the application for review and on parties to the proceeding.

(2) If the Commission grants review of a Review Board final decision and requests that briefs be filed, the parties may file briefs and reply briefs, which shall not exceed 25 double-spaced typewritten pages. Briefs shall be filed with-

in 30 days after release of the order granting review. Reply briefs shall be filed within 10 days after the last day for filing briefs.

* * * * *

FOOTNOTES

[1] *Ronald F. Trinchitella,* FCC 89-270, released August 16, 1989 at n.4.

[2] *Id.* (quoting *Amendments to Parts 0 and 1 of the Commission's Rules with respect to Adjudicatory Re-Regulation Proposals,* 58 FCC 2d 865, 876 (1976)).

[3] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-238

In re Applications of

RONALD SORENSON	File No. BPH-870430MM
CLEAR CHANNEL COMMUNICATIONS, INC.	File No. BPH-870430MO
MIDWEST RADIO, INC.	File No. BPH-870430MQ
SANTEE BROADCASTING, INC.	File No. BPH-870430MV
ASTERISK BROADCASTING, INC.	File No. BPH-870430NB
BEVERLY J. HEWITT, RUTH SIRKO, *et. al.* d/b/a HIGH TOWER PARTNERSHIP	File No. BPH-870430ND

For Construction Permit for a
New FM Station on Channel 298C2
(107.5 MHz) at Des Moines, Iowa

Appearances

Spencer W. Weisbroth, *Donald Martin* and *Barry Skidelsky* on behalf of Ronald Sorenson; *Joel H. Levy* and *Richard A. Helmick* on behalf of Clear Channel Communications, Inc.; *Edward W. Hummers, Jr.*, *Jill F. Ponder*, *Vince Curtis Jr.*, and *Robert A. DePont* on behalf of Midwest Radio, Inc.; *Ann Bavender* and *Richard F. Swift* on behalf of Santee Broadcasting, Inc.; *Dennis Begley* and *Matthew McCormick* on behalf of Asterisk Broadcasting, Inc.; *David Oxenford*, *Jonathan W. Emond*, and *John K. Hane* on behalf of High Tower Partnership; and *James Shook* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
WALTER C. MILLER

Issued: September 14, 1989 Released: September 22, 1989

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1. Originally fourteen mutually-exclusive applicants applied for authority to operate a new FM station on Channel 298C2 (107.5 MHz) in Des Moines, Iowa. *See* 53 F.R. 19042 published May 26, 1988. Six remain: (1) Ronald E. Sorenson; (2) Clear Channel Communications, Inc.; (3) Midwest Radio, Inc.; (4) Santee Broadcasting, Inc.; (5) Asterisk Broadcasting, Inc.; and (6) High Tower Partnership.

2. After the interlocutory cycle had run its course, and after certain partial settlements had been approved, only the standard comparative issue and the ultimate conclusionary issue remained to be resolved:

(1) To determine which of the proposals would, on a comparative basis, best serve the public interest; and

(2) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

3. An additional matter must be considered under the standard comparative issue. The Chief, Audio Services Division has called for comparative coverage evidence. *See* 53 F.R. 19042 *supra*., at para. 12.

4. We held the prehearing conference on August 25, 1988, an evidentiary admission session on September 22, 1988, and hearings on November 7 and 8, 1988. The evidentiary record was *first* closed on November 8, 1988 (FCC 88M-3825, released November 10, 1988). However, because three of the applicants (Midwest, Santee, and Sorenson) failed to produce all of the relevant documents at the hearing, the record had to be reopened and reclosed five times.[1] *See* FCC 88M-4346, released December 22, 1988; FCC 89M-143 released January 17, 1989; FCC 89M-235, released January 24, 1989; FCC 89M-280, released January 26, 1989; and FCC 89M-320 released January 31, 1989. So the record was finally closed on January 31, 1989.

5. The six applicants and the Mass Media Bureau filed proposed findings of fact and conclusions of law on January 17, 1989.[2] Sorenson, Midwest, Santee and High Tower all filed replies on January 27, 1989. Midwest then petitioned for leave to file a supplement to its Reply on February 27, 1989. The Presiding Officer granted that petition, and accepted the supplement along with Ronald Sorenson's additional March 9, 1989 Reply, and High Tower March 14, 1989 Reply. *See* FCC 89M-1003 released March 29, 1989.

FINDINGS OF FACT
ISSUE 1 - THE STANDARD COMPARATIVE ISSUE

6. *Description of the Applicants*: *Ronald Sorenson* has filed BPH-870430MM as an individual applicant and sole proprietor.

7. *Clear Channel*, a Texas Corporation, is authorized to issue 10 million shares of common voting stock with a fair value of ten cents per share and 2 million shares of preferred voting stock with a par value of one dollar per share. As of August 1988, there were 3,903,023 shares of common voting stock issued and outstanding. Clear is a publicly traded corporation. The investing public owns about 32% of its shares, and the other 68% is owned by officers, directors, and affiliates. The following individuals are Clear's officers, directors, and/or stockholders:[3]

CHART

Name	Position	Shares
Natalie R. Conner	Vice President	0
Alan Feld	Director	5,940 (<1%)
Bill Hill	Vice President	0
Sam J. Jones	Vice President	0
Robert L. Jones II	Vice President	22 (<1%)
Thomas F. Olien	Senior Vice President Chief Financial Officer	0
Bonnie K. Liebmann	Corporate Secretary	0
Dale J. Matteson	Vice President	0
L. Lowry Mays	President, Director, Chief Executive Officer	1,305,876 shares (33.5%)[4]
B. J. McCombs	Director	1,275,033 (32.7%)
Bill Paddock	Vice President	0
John Rockweiler	Vice President	0
Robert Scherer	Vice President	0
Stanley Shields	Vice President	0
James D. Smith	Regional Vice President	0
Theodore Strauss	Director	13,200 (<1%)
James Stanley Webb	Vice President	1,452 (<1%)
Jere Tim West	Vice President	0
John H. Williams	Director	5,400 (<1%)

8. *Midwest Radio, Inc.* Midwest, a sub-chapter-S corporation, is an Iowa corporation. They have no bank account. There are two classes of stock, voting and non-voting. Richard C. Eychaner is President, Vice-President, Treasurer, Secretary, and Midwest's sole Director. The corporation is authorized to issue 100,000 shares of voting common stock and 100,000 shares of non-voting common stock. (Midwest Ex. 1; Sorenson Ex. 5-6; Tr. 303, 356-362, and 386).

9. Mr. Eychaner holds 10,125 common voting shares; i.e., 100% of the issued and outstanding voting shares. He also holds 1,625 non-voting shares. These 1,625 non-voting shares represent a 13% non-dilutable interest in Midwest, and are held in escrow for the other Midwest stockholder, Des Moines Skywave, Inc. in case Mr. Eychaner defaults on a $65,000 note he has given Skywave.[5] Skywave holds 750 shares of non-voting stock in Midwest. This represents a non-dilutable 6% interest in Midwest's total equity.

10. There are specific restrictions on Midwest's non-voting shareholders. They cannot act as employees of the corporation; they cannot serve in any material capacity as an independent contractor or corporate agent; they cannot communicate with the licensee or voting stockholder on matters pertaining to the day-to-day operations of the radio station; they are absolutely prohibited from participating in any decisions on the issuance, sale, or other transfer of voting stock; they are barred from performing any services to the corporation except for making loans to, or acting as surety for the business; and they are expressly prohibited from becoming actively involved in the management or operation of the media business of the corporation.

11. *Santee Broadcasting, Inc.* Santee, a South Carolina Corporation, is authorized to issue ten thousand shares of voting common stock. Two thousand shares have been issued and are outstanding. There are two stockholders, Henry T. Everett, and his cousin George R. Tindal.[6] Each owns one thousand shares of common stock or 50 percent of the issued and outstanding voting common stock of the corporation.

12. Mr. Everett is President, Secretary, and one of two directors of Santee. Tindal is Vice-President, Treasurer and the remaining Director.

13. *Asterisk Broadcasting, Inc.* Asterisk Broadcasting, Inc., a Florida corporation, is owned by Asterisk, Inc. Richard S. Ingham, Sr., owns 100% of Asterisk, Inc.'s voting stock. In addition, Asterisk, Inc. (Richard Ingham) is the 100% voting shareholder in Asterisk Communications, Inc., and Asterisk Radio, Inc.

14. Asterisk Broadcasting has the following officers: Frederick F. Ingham - President, and Director; Annelle I. Carney - Vice President, and Director; and Richard S. Ingham, Jr. - Vice President and Director. These three people are Richard S. Ingham, Sr's children, and they are also officers and directors of Asterisk, Inc.; Asterisk Communications, Inc.; Asterisk Radio, Inc.; and Asterisk Printing, Inc.

15. *High Tower Partnership*. High Tower, a general partnership, was formed on April 15, 1987. It has three principals with the following equity interests: Ms. Ruth Sirko (46%), Ms. Beverly J. Hewitt (5%), and Mr. Irvin Davis (49%). Each partner has one equal vote in all decisions on the conduct of the business.

DIVERSIFICATION OF MASS MEDIA

16. *Ronald Sorenson*. has no ownership in any medium of mass communications. He is the sole proprietor of "KBLE-FM(cable)," an audio program production service in Des Moines. KBLE's programming is distributed by Heritage Cablevision, a local cable service. However, while Sorenson believes that this service is not a cognizable media service, he has pledged to divest himself of this enterprise if his application is granted.

17. *Clear Channel*. Clear Channel is the licensee of WOAI(AM) and KAJA(FM), San Antonio, Texas; KPEZ, Austin, Texas; KXTC(AM) and KHYS(FM), Port Arthur, Texas; KTAM(AM) and KORA(FM), Bryan, Texas; KAKC(AM) and KMOD(FM), Tulsa, Oklahoma; KTOK(AM) and KJYO(FM), Oklahoma City, Oklahoma; WELI(AM), New Haven, Connecticut; WQUE(AM) and WQUE(FM), New Orleans, Louisiana; and WHAS(AM) and WAMZ(FM), Louisville, Kentucky. Clear Channel is also the licensee of low power television station (K28AK), College Station, Texas, and has been awarded new LPTV construction permits for Corpus Christie (K22BHO), San Antonio (Channel 17), Waco (K62CY), Texas, and Oklahoma City (K29EK), Oklahoma.

18. Clear Channel owns and operates the Oklahoma News Network, a satellite-delivered (wired) network serving stations primarily in Oklahoma. KTOK, KMOD, and KAKC (see Finding 16 *supra*.) are affiliated with the Oklahoma News Network.

19. Clear Channel principal L. Lowry Mays is a member of the Board of Regents of Texas A and M University. The University is license of KAMU-TV and KAMU-FM, College Station, Texas.

20. Clear Channel principal B. J. McCombs owns 30% of San Antonio Channel 2, the permittee of LPTV Station K02MX, San Antonio, Texas.

21. *Midwest Radio*. Neither Midwest nor Richard C. Eychaner has any ownership interest in or connection with any medium of mass communications.

22. *Santee*. Neither Santee, nor Mr. Everett, nor Mr. Tindal have any ownership in or connection with any medium of mass communications.

23. *Asterisk Broadcasting, Inc.* ABI and its principals have substantial ownership interests in other media of mass communications. ABI is the licensee of WJBU(AM) and WJST(FM), Port St. Joe, Florida. In turn, ABI is a wholly-owned (100%) of Asterisk, Inc. Richard S. Ingham owns 100% of the voting stock and is president, treasurer, and director of Asterisk, Inc.

24. Asterisk, Inc. (the parent company) also owns 100% of the voting stock of: (1) Asterisk Communications, Inc., the licensee of Stations WTRA(AM), and WTRA, Dunnellon, Florida; (2) Asterisk Radio, Inc., licensee of WAMR(AM) and WCTQ(FM), Venice, Florida; and (3) Asterisk Printing, Inc., the publisher of the following weekly newspapers: (a) the *Anna Maria Press*, Anna Maria Island, Florida; (b) the *Bradenton Press*, Bradenton, Florida; and (c) the *Palmetto Press*, Palmetto, Florida.

25. In addition to being an officer an director of the parent corporation, Richard S. Ingham is also secretary, treasurer, and director of the four subsidiary Asterisk operations: His three Children: Frederick H. Ingham, Richard S. Ingham, Jr. and Annabelle I. Carney are officers and directors of both the parent (Asterisk, Inc.) and all four subsidiaries.

26. *High Tower Partnership*. High Tower itself has no other media interests. However, its largest single equity holder, Irvin Davis (49%) does. Davis is the majority stockholder, President, and a director of Admiral Broadcasting Corporation, the licensee of KTUF(FM), Kirksville, Missouri. He is also the permittee of a new FM station at Galveston, Texas. Kirksville is about 150 miles from Des Moines, and Galveston is about 1,000 miles. In addition to KTUF, Kirksville has another FM, an AM, and a television station. In addition to Davis' Galveston permit, and FM, two AM, and a television station are assigned to Galveston.

27. *Diversification Intermediate Facts*. Three of the six remaining applicants hold attributable media interests: Clear Channel, Asterisk and High Tower. *Clear* owns attributable media interests in 15 radio stations (seven in Texas, four in Oklahoma, two in Louisiana, and two in Kentucky). They also hold four low power television permits (three in Texas, one in Oklahoma). In addition, Clear owns and operates the Oklahoma News Network, and Clear principal B. J. McCombs owns 30% of an LPTV station in San Antonio, Texas (Findings 16-20 *supra*,).

28. *Asterisk Broadcasting*. has an ownership interest or an attributable ownership interest in six radio stations and three weekly newspapers, all located in Florida.

29. *High Tower*. owns an FM station in Missouri, and FM construction permit for a station in Texas. Sorenson, Midwest, and Santee own no cognizable mass media interests. So Sorenson, Midwest, and Santee are entitled to *decisive* decisional preferences over Clear Channel, and Asterisk, and to *substantial* preferences over High Tower on this primary comparative criterion.

BEST PRACTICABLE SERVICE

30. *Comparative Coverage*. Under the HDO we must consider comparative coverage. *See* Finding 3 *supra*. The following chart depicts the areas and populations that each applicant will cover within their respective 1 mV/m contours. (see Engineering Joint Exhibit):

CHART

Applicant	Area (Sq. Km.)	Population
Ronald Sorenson[7]	6,770	402,200
Clear Channel	8,550	438,500
Midwest Radio	8,520	433,400
Santee Broadcasting[8]	8,520	432,000
Asterisk Broadcasting	8,540	434,000
High Tower Partnership	8,540	433,200

31. All proposed service areas presently receive five or more primary aural services both day and night. So no underserved areas are involved.

32. Except for Sorenson's, the other five proposals are virtually indistinguishable. So as between those five proposals none warrants a comparative preference over the other. *Barnes Enterprises, Inc.*, 69 FCC 2d 1957, 1962-1963 (Rev. Bd. 1978). However, those five proposals serve between 7.6% and 9.6% (29,800 to 38,700) more people than Sorenson would. So while they merit a preference over Sorenson, since no underserved areas are involved, it is a very slight preference. *Cotton Broadcasting Company*, 104 FCC 2d 473, 477 (1986).

33. *Integration of Ownership With Management. Ronald Sorenson* As a sole proprietor Sorenson claims 100% quantitative integration. He proposes to work full time (at least 40 hours a week) as General Manager of the proposed station. In that capacity, he will supervise all department heads and key employees; he will be responsible for hiring and firing all employees; and he will determine and implement the stations policies. He will withdraw from all other employment or activities that would interfere with his commitment to the station.

34. Ronald Sorenson was born in Des Moines, Iowa (the city of license) on February 26, 1948. He *currently lives and has lived in Des Moines* all of his life. He intends to remain a Des Moines resident whether or not his application is granted.

35. Sorenson has *previous broadcast experience* both as a staff member and a manager. From 1976-1971 he was employed fulltime for KFMG-FM, Des Moines, Iowa. He was an announcer from 1976 to 1971, and KFMG-FM's program director from 1971. As program director Sorenson supervised five fulltime and two parttime announcers, including KFMG's music director.

36. In 1972, Sorenson became involved in democratic party politics and George McGovern's presidential campaign. He became the fulltime paid Midwest Regional Radio Network Coordinator for the McGovern campaign. In that capacity he supervised a staff of one fulltime paid employee and 30 to 40 parttime volunteers. The staff edited audio feeds, and then transmitted the edited materials to radio stations in a five-state area in the Midwest, including Iowa, for use in their news programming.

37. He left broadcasting briefly in 1973, and went to work for a Music Factory, a local Des Moines chain of retail record and tape stores. He was with the music factory chain until 1975. He started as a retail clerk, was promoted to store manager, and promoted again to the position of music buyer for the entire chain.

38. Sorenson returned to broadcasting in 1975 when he founded "KBLE FM" cable, an audio program production service in Des Moines, whose programming is distributed by a local cable system. He has been the owner-operator and manager of that audio program production service since that time.

39. Since 1975, Sorenson has continuously produced scheduled, and provided public service announcements (PSAs) pertinent to Des Moines' civic groups on his audio programming service. On average, he devotes two or three minutes of every transmission hour to airing these PSAs. The program service operates 24 hours a day.

40. Ronald Sorenson has been *civically active* in other ways in Des Moines practically all of his adult life. In 1972 he was elected as a delegate to the Democratic Party Conventions at the district county and state levels. He was also an alternative delegate to the Democratic National Convention.

41. In 1974-1975, he was a volunteer telephone counselor for Community Telephone Services a non profit agency that provided crisis intervention and assistance to trouble teenagers and other in Des Moines. He devoted four to five hours a week to this activity.

42. Sorenson is a member of the Drake Neighborhood Association. In 1979, and again in 1980, he served as master of ceremonies for the Association's "Fall Fest" Street Fair. In 1985 and 1986, Mr. Sorenson helped organize and stage benefit concerts in Des Moines. These concerts, known as "Iowaide I" and "Iowaide II" were fund-raising vehicles for the Food Bank of Iowa and the Iowa Farm Unity Coalition, both local non profit charities. Sorenson recruited performers and was the master of ceremonies for both concerts.

43. Ronald Sorenson is a white nonhispanic male.

44. *Clear Channel Communications, Inc.* Clear Channel doesn't claim any integration credit, so none will be awarded.

45. *Midwest Radio Inc.* Midwest claims 100% quantitative integration. They intend to integrate their sole-voting shareholder, Richard C. Eychaner, into the proposed station's day-to-day operations. Eychaner is President, Vice-President, Treasurer, Secretary and sole director of the corporation. He will serve fulltime (at least 40 hours a week) as the proposed station's General Manager. In that capacity he will oversee the construction and operation of the proposed station, and will be the ultimate authority for all decisions affecting the station. He will control the station's programming, and supervise all other management personnel. Eychaner also intends to devote some of his worktime to non-management functions such as selling advertising time. In fact, he's committed to selling advertising to the extent that it's necessary to pay the bills. (Tr. 382).

46. Eychaner's integration pledge lacks both permanency and specificity. He merely states: " In order to effectuate this proposals, I will curtail day-to-day involvement in my other business activities as necessary upon commencement of operations of the proposed station."[9]

47. Richard C. Eychaner was born in and grew up up in DeKalb, Illinois in 1948. He lived in Des Moines from 1975 until 1986. Then he moved to West Des Moines where he currently resides. West Des Moines is within Midwest's proposed 1 mV/m service area. If Midwest is granted the CP he will continue to reside "in the Des Moines area." Midwest Ex. 2, p. 2.

48. From 1966-1968 Eychaner attended Illinois Wesleyan University doing undergraduate work. From 1960-1980 he was a lay minister. Then from 1970-1972 he attended American University in Washington, D.C. and graduated from A.U. in 1972 with a Bachelor of Science, Magna Cum Laude. From 1972-1973 he attended the St.

Paul School of Theology, Kansas City, Missouri. At that time he intended to be a Methodist minister, but abandoned that goal.

49. Mr. Eychaner has never owned and operated a broadcast station, but he has had a varied and successful *business career* to date. From 1976 until 1986, Mr. Eychaner was the primary owner and operator of Midwest Moving and Storage Inc., a Des Moines moving agency. In 1986, he sold that business and entered into a consulting arrangement with the new owners. That consultancy ended in 1988, but Eychaner still leases the company a building, and equipment.

50. Currently Mr. Eychaner is the 80% owner and president of Movies America, Inc. Movies America, Inc. owns four "Movies To Go" outlets, a chain of video tape rental and sales equipment. A Movies America, Inc. subsidiary owns two additional Movies To Go outlets. Four of the outlets are in Des Moines, the other two are in Ames. Movies To Go is an expanding business. The newest store in Ames opened just prior to the hearing in this proceeding. Eychaner spent a considerable amount of time at the Ames store for the two months preceding the hearing. As president of the company, Mr. Eychaner must spend time at the Ames stores. (Midwest Ex. 2, p. 6; Tr. 287, 313, 318-319). Eychaner will continue to hold his 80% of Movies Amercia, Inc. even if Midwest is granted the CP. But he says he will turn over control of the video business to his Vice-President, Andrew Burton.

51. Mr. Eychaner also owns directly, personally and solely a number of commercial real estate properties. They include three properties he leases to Movie America, Inc. He owns and operates a parking concession in Des Moines. Eychaner also owns 50% of a 138 acre campground called "Elkhorn Ranch, Inc." He and his partner are developing this ranch land into a profit-making religious retreat area (Midwest Ex. 2, p. 9," Tr. 331-331). Eychaner is interested in future real estate developments.

52. Eychaner is a businessman by his "very nature," and he applied for the FM frequency involved here because he had cleaned up a number of business affairs prior to that time. Because of time constraints, he probably would not have applied for the station if the opportunity to apply for the station had come earlier. His business philosophy and past practice is of starting, and then selling business. Conceptually, Eychaner would like to have 150 businesses. (Tr. 291, 329-331). But he now admits that he no longer intends to accumulate that many (Tr. 408).

53. Richard Eychaner also has some limited *broadcast experience*. In 1980 he began producing and hosting a local public affairs discussion program, "Iowa Inquiry" for the Iowa Cable Network. From 1980 to 1983, the program was produced daily. Since that time he has produced it weekly. He spends about two hours a week at this activity. He plans to continue this program on his proposed radio station if he acquires the construction permit.

54. Between 1982 and 1986 he owned 20% of the Iowa Cubs baseball team. He was also an officer and director of that team, and coordinated radio station coverage for the team. During the 1982 and 1983 reasons he served as color commentator for the local cable television station.

55. Eychaner has been and is *civically active* in Des Moines. From 1978 to 1984, he was a member of Hawthorne Hill Board, a multi-ministry center in Des Moines. From 1980 to 1983, he was a member of the Board of the Des Moines Urban Mission Council, a social outreach program for the poor. In 1981, he helped organize the Family Protection Coalition which brought about 20 social organizations and groups together to challenge passage of the Family Protection Act. In 1980 he also served on The National Convention project which lobbied presidential candidates on gay rights issues.

56. Mr. Eychaner was a member of the Women's Political Caucus from 1982-1986; an Advisory Board member of the Iowa Freedom Foundation, Inc. From 1982-1984, and a member of the Iowa Civil Liberties Union from 1982 to the present. He was a director of the ICLU in 1983-1984.

57. In 1979, Eychaner founded the Political Action Committee of the Gay Coalition of Iowa and served as its president in 1981-1982. From 1982 to the present Eychaner has been a member of the Des Moines Development Corporation. In 1980, he became a member of the Iowa *Ripon* Society and since 1986, he has served as a member of its steering committee. In 1988 Eychanger cofounded the Iowa Video Association, and became its first president. IVA is a lobby that expects to address specific tax issues affecting the video industry.

58. From 1980 to 1984, and from 1987 to the present, Mr. Eychaner has served on the Folk County Republican Central Committee. On April 18, 1980, he testified before the Republican National Convention Platform Committee on Gay Rights issues. In 1982 he was elected to serve on the Polk County Republican Platform Committee, and in 1984 he unsuccessfully tried to obtain the Republican nomination for the 4th Congressional District in Iowa. Although he was unsuccessful in 1984, Eychaner still harbors an intent to serve in a federal elective political position or in the executive branch of the government (Midwest Ex. 2; Tr. 338-340).

59. Richard C. Eychaner is a white non-hispanic male.[10]

60. Midwest's opponents attacked Eychaner's integration proposal on basically two grounds. First, they point out that Eychaner holds both voting and non-voting stock. *See* Finding 9 *supra*. Then they further point out the non-voting stock certificates specifically prohibit non-voting stockholders from becoming involved in any capacity in the business. So, they argue, under these circumstances Midwest is entitled to no integration credit whatsoever. Those arguments are rejected for the reasons set out in *Cotton Broadcasting Company*, FCC 89-46, released February 23, 1989.[11]

61. Secondly, Midwest's opponents argue that Eychaner's integration lacks permanency. They claim that Eychanger's history of short-term investments, his numerous current business investments, his political involvements, and his avowed political ambitions make it unlikely that he will effectuate his integration proposal.

62. Although there is much more merit to the second contention than the first (see Finding 60 *supra*.), it too will be rejected. There is no evidence of short term investments, unless you consider his 4-year, 20% ownership of the Iowa Cubs a short-term investment (see Finding 54 *supra*.). His political involvements appear to be for causes and businesses he deeply believes in (compare Finding 50

with 57 *supra.;* Findings 48 with 51 *supra.*; and Findings 57-58 with Footnote 10 *supra.*). Rather, it appears that Mr. Eychaner has developed the knack for financially profiting from those causes he believes in. But that is no basis for denying his 100% quantitative integration claim. Indeed, his business successes leads one to believe that he would also be a successful broadcaster. To the extent that his numerous business investments, his political involvements, and ambitions, and his business philosophy cast an aura of impermanency around his integration pledge, that aura will be considered in evaluating the quality of his integration pledge. But Midwest's claim for 100% quantitative integration will be honored.

63. *Santee Broadcasting, Inc.* Although Santee claims 100% quantitative integration, that claim is reduced to 50% because of the unfortunate and untimely death of George Tindal on May 11, 1989. *See* Findings 11-12 and Footnote 6 *supra.*; also see FCC 89M-1730, released June 26, 1989.

64. Santee claims 50% quantitative integration for injecting Henry T. Everett, its president, secretary, director and 50% owner into the proposed station's day-to-day operations. They say that Everett will work full-time (a minimum of 40 hours a week) as general manager of the proposed station. In that capacity, he will manage the station, supervise its department heads, and maintain station relations with the city of Des Moines. As a director of Santee, Mr. Everett will also help to establish overall station policies.

65. Henry Everett was born in Manning, South Carolina on October 1, 1952. He lives at Lakeview Drive in North Summerton, South Carolina. Santee claims that if it is awarded the construction permit Everett will move to and reside in Des Moines. Everett says he will resign from any employemnt he may have to work fulltime at the proposed radio station.

66. Everett's claim for 50% quantitative integration will be denied. Santee has failed to successfully demonstrate that Everett can or will carry out his integration pledge to move and reside in Des Moines and construct and operate the FM station. In fact, when Everett's testimony about the pledge is compared with his now deceased partner's (George Tindal's), a finding is warranted that he does not intend to move to Des Moines.

67. Henry Everett has lived in South Carolina his entire life except for five months when he attended a college in Georgia. He graduated from Wofford College in South Carolina and did his graduate work at the University of South Carolina. The rest of his family, his mother and brother, live in Summerton, South Carolina; his father and grandfather were native South Carolinians; and his family is one of the old established South Carolina families. In fact his family owns a plantation that it has held since the early 1700s, and he belongs to the third oldest church in South Carolina.

68. Mr. Everett owns a few thousand acres of land in South Carolina, but he is not sure how much. He owns some commercial property in Sumpter, South Carolina, and is the beneficiary of a trust that holds property all over the state of South Carolina. In fact, he lives in a house that's in trust from his father's estate. Everett doesn't own any property, or have any bank accounts or hold any stock in any corporation outside of South Carolina.

69. Henry Everett is currently self employed. He is a one-half partner (along with his late cousin, George Tindal) in a concern that owns three retail and one wholesale liquor outlets. All of these outlets are in Sumpter, South Carolina, about thirty-five miles from his residence. Everett and Tindal have owned these liquor outlets for about nine years, since Mr. Everett was in college. The outlets are profitable and have shown a profit every year they've been in business.

70. Although he is actively involved in the liquor business, and visits the office daily, Everett claims that he spends very little time in the actual operation of the stores, about 5-15 hours per week (Tr. 429-432, 451, 496). However, George Tindal says that Everett "spends a good bit of time" running the liquor store business, that Everett does the day-to-day operations of the store. (Tr. 519, 539-540).

71. Everett and Tindal formed Santee in 1982 to apply for a radio station in North Charleston, South Carolina. That application was dismissed when the case settled out. Later, they applied for Des Moines. *After* they applied for Des Moines, Everett and Tindal also applied for FM stations in Honolulu, Hawaii and Lexington, Kentucky.

72. Everett and Tindal differed about their plans for the Honolulu and Lexington proposals.[12] On the other hand, Everett says: he has not discussed integration plans with Mr. Tindal for either the Hawaii or Kentucky stations; that at the time the Des Moines application was filed, he and Tindal had only discussed the possibility of filing in one other market, but had decided against it; and that at the time Des Moines was filed they (he and Tindal) had no intention of filing for either Honolulu or Lexington.

73. On the other hand, George Tindal said that at the time the Des Moines application was filed he and Everett were " still discussing other markets" where they could apply for stations; and that he and Mr. Everett had discussed "in depth" the possibility or moving to either Lexington, Kentucky, or Honolulu, Hawaii; and that both he and Mr. Everett would move to either place.

74. Henry Everett has no broadcast experience whatsoever, and is a white, non-hispanic male. He knows virtually nothing about Des Moines, Iowa. He has only been to Des Moines once, in 1976, while passing through on a trip to Alaska.

75. The foregoing findings (Findings 65-74 *supra.*) make it virtually impossible to conclude that Henry Everett will fulfill his integration pledge. Indeed, the record evidence points solidly to the intermediate finding that Henry Everett will not carry out his representation to the Commission that he will move from North Summerton, South Carolina to Des Moines, Iowa, and construct and operate the proposed Santee FM station. Therefore, Santee will not be awarded any quantitative integration credit.

76. *Asterisk Broadcasting, Inc.* Asterisk doesn't claim any integration credit, so none will be awarded.

77. *High Tower Partnership.* High Tower claims 66 2/3% quantitative integration. They proposed to integrate two of their three general partners: Ms. Ruth Sirko, a 46% general partner; and Ms. Beverly Hewitt, a 5% general partner. However, the third partner, the primary mover behind the partnership, and Ms. Sirko's present employee, Mr. Irvin Davis (49%) will not be integrated.

78. Irvin Davis is the majority owner of Clayton-Davis and Associates, Inc., an advertising and public relations firm based in St. Louis, Missouri. Ms. Sirko is media

director of Clayton-Davis, vice-president of the company, and a member of its planning board. All of the High Tower principals met through their work with Clayton-Davis. Ms. Sirko has known Mr. Davis for 31 years. Ms. Hewitt learned about the Des Moines opportunity from Mr. Davis. As she puts it, the project is "Irv's." When Hewitt and Davis discussed the Des Moines opportunity, they discussed her favorable status as a local female.

79. As previously noted, Irvin Davis is the moving force behind the High Tower. He put the High Tower application together. He hired the attorneys and the engineer. He located the transmitter site, and arranged for the financing. Up until October 31, 1988 (a week before the hearing) Davis paid all but a nominal amount of the expenses, $41,000.

80. It was Davis who paid the $6,000 hearing fee. High tower's bills are regularly sent to the Clayton-Davis office, and are processed by Clayton-Davis' bookkeeper. Most of High Tower's bills are charged to Clayton-Davis corporate charge cards, and the corporation is reimbursed later. High Tower doesn't have any individual bank account. The partnership lists its initial place of business as 8229 Maryland Avenue, St. Louis -- Clayton-Davis' main headquarters.

81. High Tower claims 33 1/3% quantitative integration for its 46% general partner, Ruth Sirko. They intend to integrate Ms. Sirko into the station's day-to-day operations as the fulltime general manager. She will work at least 40 hours a week, supervise all station employees and oversee all station operations. Although she has worked for Clayton-Davis for more than 20 years, she says she will terminate all present ties and resign all positions with Clayton-Davis if High Tower's application is granted.

82. Ruth Sirko was born on July 9, 1945. She has been a resident of Fairmont City, Illinois for twelve years. She has two children, ages 12 and 22. Her husband owns his own business as an auto mechanic. Ms. Sirko proposes to move her entire family to Des Moines and live within the Des Moines' city limits. If High Tower is granted she says her husband will abandon his business to move to Des Moines. (Tr. 689).[13]

83. Until her deposition, Mrs. Sirko had never been to Des Moines. Her previous contacts with Des Moines occurred about five years ago, and came about through her work with Clayton-Davis; i.e., buying media and contacting radio people. (Tr. 546, 713, 745).

84. Ruth Sirko has no direct broadcast experience. But she does have some media-related experience arising out of her Clayton-Davis employment. She has developed on-air promotions, prepared station promotional materials, and has experience in radio sales and programming. She has helped put a new Station (KTUF, Kirksville, Missouri) on the air. She helped interview and hire station staff. She helped train the sales staff.

85. Ms. Sirko seeks qualitative enhancement as a white non-hispanic female.

86. High Tower claims 33 1/3% quantitative for its 5% general partner, Beverly J. Hewitt. They intend to integrate Ms. Hewitt fulltime (at least 4 hours a week) into the proposed station's operations as the Operations Manager. In that capacity she will purportedly oversee the day-to-day ministerial station tasks, and the day-to-day activities of the station employees. However, it isn't clear what authority is Ms. Sirko's and what is Ms. Hewitt's. For example, on major purchases, determining staff salaries, and final programming decisions, Ms. Sirko will make the ultimate decisions. Ms. Hewitt's hiring authority is limited to the clerical staff; i.e., she will not hire the engineer, sales-manager, on-air personalities, or program director. In addition, and even for those clerical employees she hires, Ms. Hewitt would have no authority to set their salaries.

87. Beverly Hewitt was born on October 1, 1938 in Grinnell, Iowa. From 1941 to 1983 she resided in Des Moines. Since then she has lived in suburban Urbandale; *i.e.*, within the proposed station's 1 mV/m contour. She will continue to reside with the station's primary service contour if High Tower's application is granted.

88. From 1966 to 1976, Ms. Hewitt worked for the Iowa Banker's Association as an officer manager. Her title was Administrative Assistant. From 1976 to 1980 she was an Administrative Assistant with the Harland Management Company. There she managed apartment projects, acquired tenants for those projects, and hired and trained on-site resident managers. Since 1980 she has been the Executive Secretary of the Hawkeye Bancorporation. She will terminate her employment with Hawkeye if High Tower is granted.

89. Although Ms. Hewitt isn't currently active in Des Moines' civic affairs, she has a laudable past record of civic activity there. From 1963 to 1964, again in 1974, and again from 1978-1979, she engaged in civic projects that helped deaf people; from 1977-1982, she served on various civic projects for the Multiple Sclerosis Society - Central Iowa Chapter; and from 1974 to 1983, she did voluntary work for two local nursing homes.

90. Ms. Hewitt has practically no past broadcast experience. However, from 1965 to 1971 she was a volunteer sign language interpreter for several television programs on KDPS and WOI-TV, both in the Des Moines area.

91. Beverly Hewitt seeks qualitative enhancement as a white non-hispanic female.

92. *Intermediate Integration Findings*. Based on Findings 33-91 *supra*., certain intermediate findings are warranted. Neither Clear Channel (Finding 44 *supra*.) nor Asterisk (Finding 76 *supra*.) seek quantitative integration, and are therefore assigned 0% quantitative credit. Santee has failed to make its quantitative integration claim stand up, and is also assigned 0% credit. *See* Findings 63-75 *supra*. High Tower will be assigned the 66 2/3% quantitative integration credit it seeks. However, the quantity of their claim is woefully inadequate when you consider that both Sorenson and Midwest are entitled to 100% quantitative integration. *See New Continental Broadcasting Co*., 88 FCC 2d 830, 50 RR 2d 1117 (1981); *Van Buren Community Service*, 87 FCC 2d 1018, 50 RR 2d 115 (1981); and *Cannon Point Broadcasting Co*., 93 FCC 2d 643 (R. Bd. 1983) at 64%.

93. *Auxiliary Power*. Sorenson, Midwest, Santee, and High Power propose to use auxiliary power generators, Clear Channel and Asterisk do not.

ULTIMATE FINDINGS OF FACT AND PRELIMINARY CONCLUSIONS OF LAW

1. Six mutually-exclusive applicants remain in the battle for Channel 298C2 (107.5 MHz) in Des Moines, Iowa: (1) Ronald Sorenson; (2) Clear Channel Communications, Inc.; (3) Midwest Radio, Inc.; (4) Santee Broadcasting, Inc.; (5) Asterisk Broadcasting,Inc.; and (6) High Tower

Partnership. No basic qualifying issues were designated or added against any of the six that weren't satisfactorily resolved by Summary Decision. The parties adduced evidence on the only contested issue, the standard comparative issue.

2. In deciding the standard comparative issue, we'll analyze the six applicants under the criteria set out in the Commission's *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 395 as modified by subsequent Review Broad and Commission decisions. And, as spelled out in that statement we will direct our analysis toward two primary objectives: (1) selecting the applicant that will offer the greatest diffusion of control of mass communications media; and (2) selecting the applicant that will offer the best practicable service to the public.

3. *Diversification of Mass Media.* Turning to the first primary objective, we see that three applicants will offer a diffusion of control of mass communicatins media (Findings 15-29 *supra.*). Sorenson, Midwest, and Santee hold no attributable broadcast interests. So they are entitled to a *decisive* diversification advantage over Clear Channel who owns 15 radio stations (seven in Texas, four in Oklahoma, two in Louisiana, and two in Kentucky). Clear Channel also owns and operates the Oklahoma News Network and one of its principals, B. I. McComb owns 30% of an LPTV station in San Antonio, Texas. Because of its decisive demerit under the diversification criterion, Clear Channel is eliminated from further comparative consideration, and will not be analyzed further.[14]

4. Similarly, Sorenson, Midwest, and Santee are entitled to a *decisive* diversification advantage over Asterisk. Asterisks has an ownership interest or an attributable ownership interest in six radio stations an three weekly newspapers. And because of its decisive demerit under the diversification criterion, Asterisk is eliminated from further comparative consideration, and will not be analyzed further.[15]

5. Sorenson, Midwest, and Santee are entitled to a *substantial* diversification advantage over High Tower. High Tower's principal, and largest single stockholder, Irvin Davis, is also the majority stockholder, president, and director of an FM station in Kirksville, Missouri, and the permittee of a new FM station in Galveston,Texas. So while High Tower isn't eliminated from further comparative consideration, they are a poor fourth in the comparative analysis, and trailing badly thus far.

6. *The Best Practicable Service.* In deciding which of the four remaining applicants will offer the best practicable service to the public, we may need to consider as many as four criterion: (1) whether any applicant or applicants should be preferred because of a superior areas and populations proposal (comparative coverage); (2) the degree each will integrate their ownership into the day-to-day management of the station (Quantitative Integration); (3) the qualities each integrated owner will bring to that day-to-day management (Qualitative Integration); whether the degree of quantitative and qualitative integration is enhanced by minority and/or female ownership. Criterion (3) includes such factors local residence, participation in civic affairs within the proposed service area, past education and business experience, past broadcast experience, and auxiliary power.

7. *Criterion (1): Comparative Coverage.* Midwest, Santee and High Tower are entitled to a *very slight preference* over Sorenson for comparative coverage. Neither Midwest, nor Santee, nor High Tower are entitled to a comparative coverage advantage vis-a-vis each other. The reason the comparative coverage criterion lacks significance in this case is because there are no underserved areas involved, and there is really no large population disparity between the four proposals. *See* Findings 30-32 *supra.*

8. *Criterion (2): Quantitative Integration.* Only Sorenson and Midwest were able to sustain their 100% quantitative integration claims. Santee's 100% quantitative claim fell apart because of the unfortunate and untimely posthearing death of 50% stockholder George Tindal, and Henry Everett's inability to demonstrate that he can carry out his integration pledge.[16] Since Santee is being given 0% quantitative integration, it will receive no further comparative consideration.[17] Similarly, and although High Tower is being credited with the 66 2/3% quantitative integration it seeks, it too is eliminated from further comparative consideration. Not only is the 66 2/3% quantitative credit woefully inadequate vis-a-vis Sorenson's and Midwest's 100%, High Tower was already in a poor comparative position because of their diversification demerit. *See* Finding 26 and Conclusions 3 and 5 *supra.*

9. *Criterion (3): Qualitative Integration.* Before analyzing the two remaining applicants (Sorenson and Midwest) it is gratifying to note that in this era of deregulation the Commission (and ultimately the public) is indeed fortunate to have *two* highly qualified applicants from which to choose. Not only are Sorenson and Midwest both basically qualified to be Commission licensees, both will integrate 100% control into the day-to-day management of the corporation. Both appear capable of constructing and operating their proposed FM operations. Ronald Sorenson will do so via a sole proprietorship, while Midwest, via its sole voting stockholder Richard C.Eychaner, will do so through a two-tier (voting and non-voting stock) corporation. Compare Findings 6 and 33 with Findings 8-10 and 60-61 *supra.*

10. Ronald Sorenson deserves a moderate preference over Richard C. Eychaner on the criterion of *local residence.* Compare Finding 34 with Finding 47 *supra.* Sorenson, a native of Des Moines, has resided in the community of license all of his life, 41 years. He intends to remain a Des Moines resident regardless of the outcome of the proceeding. Eychaner, born in Illinois, moved to Des Moines in 1975, and resided there until 1986. In 1986 he moved to West Des Moines where he currently resides. West Des Moines is within the proposed station's 1 mV/m contour. If granted Eychaner will continue to reside "in the Des Moines area."

11. On the other hand, Richard Eychaner deserves a moderate preference over Ronald Sorenson for participating in *civic affairs* in Des Moines. Compare Findings 39-42 with Findings 55-58 *supra.* In fact, Eychaner is so civically active and pursues so many different business activities (Findings 48-52 *supra.*) it has led opposing applicants to question his ability to meet an integration pledge that lacks both specificity and permanency (Findings 45-46 *supra.*). Nevertheless, his civic affairs and business activities will be credited, and he will be given the moderate preference he deserves.

12. Neither Sorenson nor Midwest can claim *minority enhancement* since both Ronald Sorenson and Richard C. Eychaner are white non-hispanic males. *See* Findings 43 and 59 *supra.* And neither can claim a preference for *auxiliary power. See* Finding 93 *supra.*

13. Ronald Sorenson deserves a substantial preference over Richard Eychanger on the criterion of *past broadcast experience*. Compare Findings 35-39 with Findings 53-54. Sorenson's nineteen years of broadcast experience has been rich and varied. He has been involved both as a staff member, a member of management, and as an owner-manager. His past broadcast experience is clearly superior to Eychaner's.

ULTIMATE CONCLUSIONS

14. Under issue 2 (see Finding 2 *supra*.) we must determine which of the six remaining applicants should be granted under the evidence adduced under the standard comparative issue.

15. Two applicants, Midwest Radio, Inc. and Ronald E. Sorenson clearly stand head and shoulders comparatively above the other four: Clear Channel Communiations, Inc.; Santee Broadcasting, Inc.; Asterisk Broadcasting, Inc.; and High Tower Partnership.

16. As between Midwest and Sorenson neither is entitled to a comparative preference under the Commission's first primary objective, diversification of mass media. *See* Findings 15-29 and Conclusinos 3-5 *supra*. So the comparative outcome will depend on the evidence adduced under the Commission's second primary objective; i.e., selecting the applicant that will offer the best practicable service to the public. *See* Conclusion 2 *supra*.

17. First, it is concluded that neither Sorenson nor Midwest should be preferred because of a superior areas and populations proposal. While Midwest serve a slight greater population than Sorenson, there is really no large population disparity between the two proposals, and no underserved areas are involved. So Midwest is entitled to a *very slight non-decisive preference* under the *Comparative coverage* factor. *See* Findings 30-32 and Conclusions 6-7 *supra*.

18. Neither Sorenson nor Midwest (Eychaner) can buttress their quantitative integration credit with *minority enhancement* since both are white non-hispanic males. Both propose *auxiliary power*, so nobody gets an advantage on that score. *See* Conclusion 12.

19. Ronald Sorenson earns a *moderate* preference over Richard Eychaner under the *local residence* criterion. But that preference is cancelled out by Eychaner's moderately superior participation in Des Moines' civic affairs.[18] *See* Conclusions 10-11 *supra*.

20. It is in the area of *past broadcast experience* that Sorenson earns his winning comparative edge. On this criterion he warrants a *substantial* preference over Eychaner. His past broadcast experience has been both rich and varied. When you combine this past experience with his lifelong residence, the conclusion is inescapable that Ronald Sorenson should be preferred over Midwest Radio, Inc. It is Sorenson that will offer the best practicable service to the Des Moines public.

21. In summary, we have two good applicants available for Channel 298C2. Either could construct and operate their FM proposal successfully, but for different reasons. Midwest, via Richard Eychaner, has a successful business background. Ronald Sorenson is a local career broadcaster. The Commission's second primary objective; i.e., selecting the applicant that will offer the best practicable service to the public, is best met by granting the local career broadcaster's application.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its motion, Ronald Sorenson's application (BPH-870430MM) IS GRANTED; and

The applications of Clear Channel Communications, Inc. (BPH-870430MO); Midwest Radio, Inc. (BPH-870430MQ); Santee Broadcasting, Inc. (BPH-870430MV); Asterisk Broadcasting, Inc. (BPH-870430NB); and High Tower Partnership (BPH- 870430ND) ARE DENIED.[19]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] These document problems were due in principal part to a last minute settlement that Midwest entered into with Des Moines Skywave, Inc. *See e.g.*, FCC 88M-3767 released November 4, 1988; FCC 88M-3781 released November 7, 1988; and FCC 88M-3778, released November 7, 1988.

[2] In their findings and conclusions the Mass Media Bureau addressed only the comparative coverage aspect of the standard comparative issue. *See* para. 3 *supra*.

[3] As of November 9, 1988 (FCC 88M-4067, released November 29, 1988). Since November 9, 1988, Clear has amended its application four times. *See* FCC 89M-31 released Janaury 6, 1989; FCC 89M-282, released January 26, 1989; FCC 89M-1067 released April 4, 1989; and FCC 89M-1959, released July 26, 1989. Only in FCC 89M-1959, *supra*., did they make some minor changes and/or additions in their officers and stockholders. Since by their own admission it is highly improbable that they will prevail in this case, the ownership picture as of November 9, 1988 will suffice.

[4] L. Lowry Mays also holds: (1) an unqualified option to purchase 66,000 shares of CCCI before April 20, 1990 at $12.12 per share; (2) an unqualified option to purchase 60,000 shares at $10.41667 per shares; and (3) a qualified option to purchase 13,200 shares at $7.57. He was to have exercised that option before April 29, 1989.

[5] Before November 7, 1988, Mr. Eychaner was *only* a voting stockholder and therefore fully capable of implementing his integration proposal. However, when he entered into his last-minute settlement agreement with Des Moines Skywave, Inc. (Footnote 1, *supra*.), he became *both* a voting and non-voting stockholder (*See* FCC 88M-3767 released November 4, 1988, and FCC 88M-3778 released November 7, 1988), thus infusing himself with conflicting obligations. (*See* Finding 10 *infra*.). " [S]uch a Janus-like arrangement cannot be countenanced for ownership integration credit..." *See Cotton Broadcasting Co.*, 104 FCC 2d 473, at para. 4. But see Finding 60 *infra*.

[6] On May 11, 1989, George Tindal was killed in a train-automobile collision in South Carolina, *See* FCC 89M-1730, released June 26, 1989.

[7] Sorenson amended his application, effective July 7, 1988. *See* FCC 88M-2125. So his areas and populations have been portrayed on a "worst case" basis.

[8] Santee amended their application effective July 13, 1988. *See* FCC 88M-2208, releasd July 13, 1988. So their areas and populations are portrayed on a worst case basis.

[9] Thus it is both desirable and necessary to make findings on Richard Eychaner's other business activities, and his business philosophy. Such findings are a requisite backdrop to evaluating Eychaner's integration pledge. *See* Findings *infra*.

[10] An acknowledged homosexual, Eychaner initially claimed minority enhancement on that basis. That claim was rejected. (Tr. 71-76).

[11] 4 FCC Rec. 1781 (1989).

[12] Tindal was sequestered while Everett was testifying. *See* Tr. 422-423.

[13] Interestingly, Irvin Davis and Ruth Sirko are two of the general partners of Commonwealth patnership, an applicant for an FM station at Louisville, Kentucky. The equity structure for the Lousiville structure is almost identical to High Tower's structure. Ms. Sirko is a 46% partner, Mr. Davis is 49%, and a local Louisville resident is the 5% partner. Query: will Ms. Sirko's husband abandon his auto mechanic business and move to Louisville?

[14] Even if Clear Channel weren't eliminated on diversification grounds, they aren't claiming any quantitative integration, and so would be eliminated under the best practicable service side of the comparative issue.

[15] Even if Asterisk weren't eliminated on diversification gounds, they aren't claiming any quantitative integration, and so would be eliminated under the best practicable service side of the comparative issue.

[16] Even *assuming* that Everett's 50% quantitative claim could be credited, Santee would be eliminated from further comparative consideration under the *NewContinental - Van Buren - Cannon's Point* line of cases. *See* Finding 92 *supra*.

[17] Note, however, that comparative findings have been made on Henry Everett. It is only further comparative conclusions that aren't necessary.

[18] Note, however, that since 1975, Sorenson has been aiding all sorts of Des Moines' civic groups by producing, scheduling, and programming their public service announcements. That is certainly a commendable activity, and shouldn't be analyzed lightly. *See* Finding 39 *supra*.

[19] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, the Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 12, 1989

ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE IMPLEMENTATION SUBCOMMITTEE MEETING

A meeting of the Implementation Subcommittee of the Advisory Committee on Advanced Television Service will be held on:

October 6, 1989
10:00 A. M.
Commission Meeting Room (Room 856)
1919 M Street, N.W.
Washington, D.C.

The agenda for the meeting will consist of:

1. Introduction
2. Minutes of Last Meeting
3. Report of Working Party 1
   Policy and Regulation
4. Report of Working Party 2
   Transition Scenarios
5. General Discussion
6. Other Business
7. Date and Location of Next Meeting
8. Adjournment

All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Implementation Subcommittee Chairman.

Any questions regarding this meeting should be directed to Dr. James J. Tietjen at (609) 734-2237 or David R. Siddall at (202) 632-6460.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL EXCHANGE CARRIER ASSOCIATION, INC. Tariff F.C.C. No. 5

Transmittal No. 364

Traffic Sensitive Switched Access Rate Adjustment

ORDER

Adopted: September 11, 1989 Released: September 12, 1989

By the Chief, Common Carrier Bureau:

1. On June 30, 1989, the National Exchange Carrier Association, Inc., (NECA) filed Transmittal No. 364, to increase its traffic sensitive (TS) switched access rates by $35.7 million or 7.3 percent.[1] These revisions are presently scheduled to become effective September 13, 1989.

2. The present NECA TS rates are those filed as part of the annual 1989 access tariff filings on December 30, 1988. Those rates became effective as filed, without adjustment, on April 1, 1989. NECA claims, however, it must retarget these rates in order to offset an unexpected increase in its TS switched access revenue requirement. NECA attributes the increase in its revenue requirement to changes in the Commission's accounting and separations rules which became effective January 1, 1988. It states that the current TS switched access rates are based on 1988 data that did not fully reflect the effect of these rule changes. According to NECA, member companies provide it with cost information applicable to varying time periods, in many cases only on an annual basis after the calendar year has ended. Under NECA's pooling and rate development process, members may submit cost studies any time within two years from the conclusion of the study period, and are eligible to share in pool revenues based on those studies. NECA states that as a result of these practices, 1988 data reflecting the ultimate effect of the new rules were not available at the time NECA filed its annual 1989 TS switched access rates. NECA claims actual data for 1988 indicate significant increases in the TS revenue requirement will occur as new cost studies are submitted. NECA states that this will erode earnings well below its authorized 12 percent rate of return, despite the fact that its booked earnings under the April 1 rates were estimated at 11.56 percent in June and have been rising. NECA projects that those earnings will also prove illusory as revised cost studies are filed. Finally, NECA projects that the settlements paid to average schedule companies will be $10.1 million higher than the level indicated in its annual filing.

3. The Common Carrier Bureau has reviewed Transmittal 364 and additional information submitted by NECA. While NECA makes a plausible claim that its earnings have been and will continue to be eroded due to errors in its projected costs, the NECA submissions do not clearly demonstrate that a rate increase of this magnitude is warranted. NECA's data do not provide a clear picture as to whether the earnings erosion from last year's rule changes will continue to the same extent. For example, NECA states that 60 percent of its small cost companies have not submitted new data and that the projection of erosion in earnings assumes those companies will show the same increase reported by the others. Moreover, additional information supplied by NECA indicates that its TS switched access earnings tend to increase as the year progresses. However, NECA has based its projected increase only on projected results through the end of 1989, even though these rates will remain in effect through June 1990.[2] If NECA increases rates based on projected results through the end of 1989, and TS earnings do trend upward, NECA would reap a substantial windfall in the first half of 1990. Finally, the entire basis for NECA's proposed increase is that not only its predictions but also its booked data have proved to be, and will continue to be, inaccurate and unreliable. The proposed increase is based on NECA's estimate of how inaccurate those data are.

4. Under these circumstances, an investigation is warranted to determine whether these increased rates are just and reasonable. We are not imposing a suspension for the statutory period. We refrain from imposing such a suspension in order to assure that those local companies will be allowed to earn a reasonable return if the earnings erosion occurs as projected.

5. To allow any refunds that may prove warranted, we are suspending the transmittal for one day and imposing an accounting order. This accounting order does not apply to any NECA member companies. Rather, NECA is directed to keep accurate and complete account of the overall monthly pool costs, revenues, and earnings achieved under these rates, and the revisions to these rates scheduled to take effect January 1, 1990. We will designate the precise issues in this investigation, the information NECA is to submit, and relevant schedules, in a future Order.

6. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), an investigation is instituted into the lawfulness of the tariff revisions filed by the National Exchange Carrier Association, Inc., in Tariff F.C.C. No. 5, Transmittal No. 364.

7. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions contained in Transmittal No. 364 ARE SUSPENDED for one day.

8. IT IS FURTHER ORDERED that the National Exchange Carrier Association, Inc., SHALL FILE tariff revisions reflecting this suspension no later than September 13, 1989. Special Permission No. 89-684 is assigned for this purpose and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived.

9. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, National Exchange Carrier Association, Inc., shall keep accurate account of all earnings, costs, and returns associated with the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] NECA's proposal would affect the local transport, local switching, and information surcharge rate elements. Non-recurring charges and directory assistance rates would remain unchanged. NECA Description and Justification (D&J) at 1.

[2] Changes that affect revenue requirements will occur in January 1990. *See* Commission Requirements for Cost Support Material To Be Filed with January 1, 1990 Access Tariff Revisions, DA 89-1056, released Sept. 1, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY

Comparably Efficient Interconnection
Plan for Enhanced Services Complex

MEMORANDUM OPINION AND ORDER

Adopted: September 11, 1989 Released: September 13, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 30, 1989, pursuant to the requirements of the *Computer III* proceeding,[1] the American Telephone and Telegraph Company (AT&T) filed a Comparably Efficient Interconnection (CEI) Plan for a variety of enhanced voice and data services offered through AT&T's Enhanced Services Complex (ESC), which will be collocated at AT&T central offices that provide basic services. In this Order, we approve the Plan for use of the ESC to provide the three categories of interactive voice services (IVS) described in the Plan.[2] We will address AT&T's request to use the ESC to provide additional services in a separate order.

II. BACKGROUND

2. Under the requirements of the *Phase I Order*, AT&T may offer a specific enhanced service, or class of services, on an unseparated basis only after approval of a CEI plan. In its CEI plan, AT&T must demonstrate that it will provide interconnection opportunities to others on an "equal access" basis, making basic facilities available to other enhanced service providers (ESPs) and users on an unbundled and functionally equal basis.[3] A CEI plan must satisfy specific CEI parameters, as well as other nonstructural safeguards governing cost allocations, the use of customer proprietary network information (CPNI), disclosure of network information, and nondiscrimination reporting.[4]

III. THE PLAN

3. AT&T states that its ESC provides an enhanced service architecture that will permit AT&T to offer numerous voice and data enhanced services using equipment located in AT&T central offices.[5] AT&T adds that the ESC will initially be used to offer interactive voice services (IVS).[6] These services, according to AT&T, will permit end users to receive and/or manipulate various types of audio information stored in the ESC. AT&T states that its IVS "transaction" offerings will permit end users to perform transactions by interacting with the ESC to retrieve and update information stored in databases external to the ESC.[7] AT&T's IVS "information" offerings will permit end users to retrieve "voice-programmed" customer information stored in the ESC.[8] AT&T's IVS "voice messaging" offerings will permit end users to record, send, and retrieve voice messages.[9] AT&T states that all of these types of IVS offerings are currently provided by both ESPs and common carriers.[10] AT&T also notes that it plans to use the ESC to provide enhanced data services in the future.[11]

4. AT&T states that the Plan fully satisfies the CEI parameters, the CEI pricing rules, and the other nonstructural safeguards. AT&T states that the underlying basic services for enhanced services provided by the ESC will consist of numerous tariffed AT&T services listed in an attachment to the Plan.[12] AT&T adds that the tariffed offerings to be used as the underlying basic services for an ESC-based enhanced offering will depend on several factors, such as the anticipated demand for a particular enhanced service and the specific needs of AT&T's ESC customers.[13] AT&T emphasizes that, regardless of which listed basic service is used for provision of a particular ESC-based enhanced service, AT&T will take the basic service at the applicable tariffed rates, terms and conditions, and will interconnect to the basic service through standard, published interfaces.[14] According to AT&T, the tariff charges for basic services used in AT&T's provision of ESC offerings are the same as those available to any competing ESP that chooses to provide a comparable enhanced service using AT&T's basic services.[15] AT&T further states that the ESC will interconnect to AT&T tariffed services, using the Central Office Equipment, at the same tariffed rates as any competitive ESP.[16] AT&T also includes diagrams displaying examples of the network configurations that AT&T intends to use to provide its IVS transaction, voice messaging, and information offerings, and gives examples of how calls will typically be routed through the ESC.[17]

5. AT&T states that, as a result, the underlying tariffed basic services it uses will have the same technical characteristics as the services provided to competing ESPs.[18] AT&T further states that it is incapable of degrading the performance of the basic services provided to competing ESPs without at the same time degrading the service for AT&T's ESC offerings, because AT&T's circuit and central office equipment assignment procedures are highly mechanized and are implemented on a non-discriminatory "first come, first served" basis.[19] AT&T further states that its nondiscriminatory provisioning and maintenance procedures for basic network services underlying enhanced services have been approved by the Commission, and AT&T incorporates those procedures by reference into the Plan.[20] AT&T also states that, because all service features and options are available under tariff on the same terms and conditions to both AT&T's ESC offerings and all other users, end user access will be identical for both AT&T's ESC customers and customers of competing services offered by non-affiliated ESPs.[21] AT&T states that all of the underlying basic services for ESC offerings have been available under tariff for a substantial period of time,[22] and adds that the existing tariffed services include no restrictions based on user identity.[23]

6. In addition, AT&T states that, to the extent it is able to minimize local transport costs for ESPs, it has already done so by providing a tariffed multiplexing function that permits ESPS and other users to access AT&T's central offices at various data speeds. AT&T states that this can

reduce the ESPs' transport costs by enabling ESPs to procure high capacity local access at a lower unit cost per channel.[24] AT&T emphasizes that the distance-sensitive dedicated local loops and trunks that connect other vendors to an AT&T central office are almost always provided by a LEC, not by AT&T, and are thus beyond AT&T's control.[25] AT&T also notes that other ESPs may be able to reduce the costs of reaching AT&T's central offices by provisioning their own access.

7. AT&T states that it will separate the nonregulated costs of all ESC offerings from AT&T's regulated costs, pursuant to the provisions of AT&T's approved Part 32 cost allocation manual.[26] AT&T further states that its approved CPNI plan, as amended, will govern AT&T's treatment of CPNI.[27] AT&T adds that there is no new or changed network information that need be disclosed in connection with the Plan.[28] Finally, AT&T states that it will submit an annual affidavit attesting that AT&T has not in fact discriminated in the quality of basic service applications, and will also adhere to the comparative installation and maintenance interval reporting requirement.[29]

8. The Independent Data Communications Manufacturers Association (IDCMA) and the California Bankers Clearing House Association, the Committee of Corporate Telecommunications Users, and the New York Clearing House Association (the Telecommunications Service Providers or TSPs) filed comments on the Plan, and AT&T and Lo-Ad Communications (Lo-Ad) filed reply comments. These filings raise issues concerning the specificity of the service description, compliance with other CEI requirements, alleged anticompetitive conduct by AT&T, and collocation.

IV. SPECIFICITY OF SERVICE DESCRIPTION

9. IDCMA contends that AT&T's plan violates the Commission's *Computer III* rules by failing to describe each specific enhanced service that AT&T plans to provide.[30] IDCMA contends that the *Computer III* orders require AT&T to file a CEI plan for each specific enhanced service that AT&T intends to provide using collocated equipment or functionalities.[31] IDCMA and the TSPs argue that because of the Plan's vagueness, potential competitors in the provision of enhanced services cannot provide meaningful comments on the adequacy of the proposed CEI arrangements, and that the Commission cannot conduct a meaningful review of the Plan.[32] IDCMA asserts that the *Bell Atlantic Gateway Order*, which AT&T cites in support of its CEI proposal, expressly rejects the proposition that the Commission should approve a "blank check" for CEI arrangements concerning unidentified services.[33] Moreover, IDCMA argues that the Common Carrier Bureau has no authority to approve a CEI plan that so "blatantly violates the requirements established in the Commission's orders."[34] Lo-Ad also argues that the Plan fails to satisfy the Commission's orders requiring the filing of service-specific CEI plans.

10. AT&T asserts that the claims by IDCMA and the TSPs have been previously considered and rejected by the Commission.[35] AT&T contends that its CEI plan satisfies the requirement of the *Phase I Order* for a "short, general description of the enhanced service offered."[36] AT&T argues that prior CEI orders sanction the type of service description contained in its Plan,[37] and states that the Commission has "repeatedly" held that separate CEI plans are not necessary when enhanced services are provided as a package and the carrier demonstates that the CEI arrangements for those services comply with the Commission's CEI requirements.[38] AT&T emphasizes that the Plan demonstrates that the CEI arrangements for the proposed services comply with the CEI pricing and interconnection requirements. Thus, AT&T argues that the description of the proposed ESC-based enhanced services clearly complies with Commission requirements.[39]

11. AT&T states that since it filed the Plan, activity in the IVS market has accelerated, noting that it now has a number of potential customers for interactive voice services.[40] As a result, AT&T states that even if the Commission is unable to act on the entire ESC plan at this time, the Commission should approve AT&T's provision of IVS based on the existing record and address the overall service architecture as soon thereafter as possible.[41] AT&T states that CEI approval for IVS will give it the ability to respond with competitive bids for IVS without having to seek approval of each specific customer application, unnecessarily taxing the Commission's limited resources and severely prejudicing AT&T's competitive position in the rapidly developing IVS marketplace.[42]

12. IDCMA opposes AT&T's request for expedited approval of the ESC CEI plan, stating that contractual commitments made in reliance on an unapproved and flawed CEI plan are not an adequate justification for Commission action.[43] IDCMA contends that in order to gain approval of the Plan, AT&T should amend it to specify the enhanced services involved and clarify its collocation policy. At the very least, IDCMA argues, "the Commission should *not* grant expeditious approval of AT&T's open-ended ESC CEI plan, which . . . would cover virtually any enhanced service that AT&T might choose to provide on a collocated basis . . . ."[44] IDCMA says such action would be contrary to the Commission's *Computer III* rules.

13. We find that AT&T's description of its IVS transaction, information, and voice messaging offerings is sufficiently detailed to satisfy the CEI service description requirements. The Commission's *Computer III* orders require that each CEI plan contain a description of the enhanced service or class of services to be provided pursuant to the Plan,[45] and we have required that the carriers specify the basic services they plan to use in the provision of each enhanced service.[46] We have allowed a single CEI plan for enhanced services that are provided as a "package" if a carrier demonstrates that the CEI arrangements for those services comply with the Commission's CEI requirements. For example, we found that there was no need to require that Pactel specifically define each of the individual Electronic Messaging Service (EMS) offerings that it intended to provide.[47] Thus, we approved the proposed EMS offering, stating that the description was sufficiently detailed, to allow us to determine:

> (a) that EMS is an enhanced service; (b) some of the essential characteristics of that service; (c) the manner in which Pactel's enhanced service operation will use underlying basic services; and (d) the manner in which ESPs will be given interconnection to such basic services in compliance with the CEI requirements of *Computer III*.[48]

Based on AT&T's description of the IVS offerings listed above and our determination that provision of these IVS offerings through the ESC satisfies our CEI requirements,[49] we find that AT&T's description of the three listed IVS offerings satisfies the service description requirement, and adequately delimits the underlying basic services to be used.[50] However, we do not, at this time, determine whether use of the ESC for the provision of other IVS or non-IVS offerings would or would not be consistent with applicable requirements. In order to facilitate action on the IVS portion of the Plan, we defer action on the remaining services to a later date.

V. CEI REQUIREMENTS

A. *Introduction*

14. The *Phase I Order* lists nine CEI parameters that all plans must satisfy.[51] These parameters are designed to ensure that the basic services used in the provision of a carrier's enhanced services are available to other ESPs in an equally efficient manner. In addition, all CEI plans must satisfy the CEI pricing requirements and nonstructural safeguards concerning the allocation of joint costs, CPNI, nondiscrimination reporting, and provision of network technical information. The following sections discuss the issues raised by the commenting parties concerning compliance with the CEI parameters and other nonstructural safeguards.

B. *Interface Functionality*

15. As part of its CEI offering, the carrier must provide standardized hardware and software interfaces that support transmission, switching, and signaling functions identical to those used in its own enhanced service offering, with information and technical specifications for such interfaces subject to the Commission's network information disclosure requirements.[52]

16. IDCMA argues that AT&T's plan is ambiguous regarding the mechanisms for effectuating communications in and out of the ESC.[53] IDCMA states that Attachment 1 to the Plan suggests that all connections to the ESC will be through a No. 4 Electronic Stored Program Control Switch, while a more efficient method for data applications would use a direct communications link between the user and the ESC, bypassing the switch.[54] IDCMA suggests that for data applications, the Commission require AT&T to specify the basic CEI services that other ESPs will use to approximate the interconnection efficiencies that AT&T may gain from non-switched access to its enhanced services equipment.[55]

17. AT&T argues that there is no basis for IDCMA's claim that AT&T's plan contains "ambiguities" regarding interconnection.[56] AT&T also asserts that IDCMA's concerns about interconnection for enhanced data services are premature because AT&T does not presently intend to offer such services, and will file an appropriate amendment to the Plan in the event that it decides to offer enhanced services whose essential characteristics or interconnection to AT&T's basic network are different from services described in the Plan.[57]

18. We find that AT&T has complied with the Commission's CEI requirements concerning interface functionalities for the provision of the three specified types of IVS. Since we do not, in this Order, consider AT&T's offering of enhanced data services through the ESC, we will not discuss IDCMA's concerns about interconnection for such services at this time.

C. *Unbundling of Basic Services and Resale*

19. The *Phase I Order* requires that the basic services and basic service functions that underlie the carrier's enhanced service offering be unbundled from other basic service offerings and associated with a specific rate element in the CEI tariff.[58] The Commission also required that the enhanced service operations of AT&T and the BOCs take the basic services used in their offerings at the unbundled tariffed rates.[59]

20. IDCMA argues that the Plan is ambiguous since it fails to indicate whether AT&T's enhanced service operations will be eligible to order basic services under AT&T's "promotional" tariff offerings or Tariff 12.[60] IDCMA contends that a danger of anticompetitive conduct will exist if AT&T can avail itself of these special tariff provisions.[61] AT&T responds that all of its promotional tariff offerings and Tariff 12 services are generally available to all customers -- including competing ESPs -- that meet the terms, conditions, and other qualifications in the tariff.[62]

21. We conclude that AT&T has met the requirements of this CEI parameter. AT&T states that all of the basic services to be used in providing the described IVS offerings are equally available to AT&T and other ESPs, and IDCMA has not made a showing to the contrary. Moreover, we believe that AT&T's possible use of promotional tariff offerings or Tariff 12 services does not warrant rejection of the Plan.[63]

D. *Non - Structural Safeguards*

22. AT&T and the BOCs must also satisfy the cost allocation requirements of the *Joint Cost Order*.[64] IDCMA argues that AT&T's Part 32 cost allocation manual does not adequately account for the benefits AT&T receives from collocation.[65] AT&T notes that in the *AT & T TSP Order*, we rejected identical arguments.[66] As we stated in that order, the adequacy of the Commission's joint cost allocation rules is not at issue in this proceeding. We also find that AT&T has satisfied our existing CEI pricing, CPNI, nondiscrimination reporting and network information disclosure safeguards.[67]

VI. ALLEGATIONS OF ANTI - COMPETITIVE CONDUCT

23. Lo-Ad asserts that approval of the Plan would allow AT&T to discriminate against competitors and engage in anti-competitive marketing practices.[68] In its filing, Lo-Ad details instances of what it believes to be anticompetitive conduct on the part of AT&T. For example, Lo-Ad argues that AT&T has discriminated against it in the provision of DS1 and Multiquest service.[69] Lo-Ad also asserts that in processing service requests submitted by Lo-Ad and its clients, AT&T failed to provide Lo-Ad or its customers with a statement explaining their rights in restricting access to their CPNI.[70] AT&T asserts that Lo-Ad's reply violates the requirement that replies be limited to previously raised issues.[71] AT&T also responds in detail to Lo-Ad's substantive allegations of anti-competitive conduct, arguing that these charges are not correct.[72] We do not believe that Lo-Ad's allegations warrant rejection of

AT&T's CEI plan since disputes of this nature concerning prior conduct are not appropriately addressed in the context of a CEI plan. We also decline to delay action on AT&T CEI plans pending modification of the Commission's CPNI and nondiscrimination reporting rules, as suggested by Lo-Ad, and find that these requests for modification of the Commission's rules are improperly presented in this proceeding. Lo-Ad is, of course, free to file appropriate pleadings seeking revision of the Commission's rules.

VII. COLLOCATION

24. The TSPs argue that the Plan will allow AT&T to collocate its enhanced services in its central offices without making similar collocation arrangements available to competing providers of enhanced services.[73] The TSPs further state that either "physical collocation" or "virtual collocation" are viable solutions to what the TSPs describe as a discriminatory preference for AT&T in violation of the Communications Act.[74] In response to these arguments, AT&T states that the Commission has repeatedly rejected identical claims by the TSPs and other parties that carriers be required to provide some form of collocation to competing ESPs under the CEI rules.[75]

25. The TSPs present arguments in support of "physical" and "virtual" collocation that are the same as those rejected by the Commission not only in the *Phase I Order* and the *Phase I Reconsideration*,[76] but also in the Commission's recent Order concerning AT&T's CEI Plan for Transaction Services.[77] In that Order, the Commission stated that requests for mandatory actual or virtual collocation essentially sought reconsideration of well-established Commission policies, and that such requests were untimely. The TSPs raise no arguments in this proceeding compelling a conclusion different from that the Commission reached in the *Transaction Services Affirmance Order*.

VIII. ORDERING CLAUSE

26. IT IS HEREBY ORDERED, that AT&T's CEI Plan for Enhanced Services Complex IS APPROVED TO THE EXTENT INDICATED HEREIN pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, 218, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154 (i) and (j), 201, 202, 203, 205, 218, and 405; 5 U.S.C. § 553; and authority delegated to the Chief, Common Carrier Bureau pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration*, FCC 89-226 (released August 1, 1989) (*Phase I Second Further Reconsideration*), *appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1988) and *sub nom. Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16,1988). *See also Report and Order*, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *further reconsideration*, FCC 89-226 (released August 1, 1989) (*Phase II Further Reconsideration*), *appeal pending sub nom. California v. FCC*, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988).

[2] Should AT&T offer IVS or CEI for IVS under any conditions other than those approved in this order, AT&T must either amend its Plan or file a new one.

[3] *Phase I Order*, 104 FCC Rcd at 1036.

[4] *Phase I Order*, 104 FCC 2d at 1020.

[5] Plan at 1-2.

[6] *Id.* at i & 3.

[7] *Id.* at 4.

[8] *Id.*

[9] *Id.* at 3-4.

[10] *Id.*

[11] *Id.* at 3, n.***.

[12] *Id.* at 5-7 & Attachment 2.

[13] *Id.* at 5.

[14] *Id.* at 5-7 & Attachment 2.

[15] *Id.* at 8-9.

[16] *Id.* at 15.

[17] *Id.* at 6. AT&T states that it will amend the Plan to demonstrate compliance with the Commission's CEI requirements if it decides to use additional basic services in the provision of its enhanced services. *Id.* at 6, n. *.

[18] *Id.* at 9.

[19] *Id.* at 10-11. AT&T states that these procedures contain no information concerning the identity of the customer and are completely neutral with respect to all aspects of basic service provisioning. *Id.* at 11.

[20] *Id.*

[21] *Id.* at 11-12.

[22] *Id.* at 12. AT&T adds that the requirement for a reasonable testing period is satisfied by the current availability of all the underlying basic services to be used by AT&T's ESC offerings. *Id.*

[23] *Id.* at 14.

[24] *Id.* at 13-14. AT&T notes that multiplexing, available under AT&T tariffs, is priced independent of distance. *Id.* at 16.

[25] *Id.* at 15.

[26] *Id.* at 17.

[27] *Id.* at 17-18.

[28] *Id.* However, AT&T states that it will comply with the Commission's network information disclosure requirements if any future changes to the network that affect the interconnection of enhanced service applications reach the make/buy point. *Id.*

[29] *Id.* at 19.

[30] IDCMA Comments at 3-5.

[31] *Id.* at 2.

[32] *Id.* at 4-5; TSP Comments at iii, 13-15.

[33] IDCMA Comments at 5-6. IDCMA contends that the Common Carrier Bureau denied Bell Atlantic's request to include computer storage and electronic mail storage in its gateway plan because Bell Atlantic had not specifically identified the underlying basic services and facilities that Bell Atlantic would supply to ESPs that desired to provide competing services. *Id.* at 6 n.16. *See also* note 38 *infra*.

[34] IDCMA Comments at 6.

[35] AT&T Reply at 5.

[36] *Id.* at 6.

[37] *Id.* at 5-6. In particular, AT&T cites The Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Gateway Services, 3 FCC Rcd 6045 (1988) (*Bell Atlantic Gateway Order)*; Pacific Bell and Nevada Bell Plan for the Provision of Electronic Messaging Services, 4 FCC Rcd 1640 (1989) (*Pactel EMS Order)*; and Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Protocol Conversion Services, 4 FCC Rcd 2744 (1989).

[38] *Id.* at 2 n. *.

[39] *Id.* at 8. AT&T argues that IDCMA's concerns regarding the provision of AT&T enhanced data services through the ESC are premature because AT&T does not presently intend to offer enhanced data services. AT&T says that it will file an appropriate amendment to its Plan in the event that it intends to offer enhanced services whose essential characteristics or interconnection to AT&T's basic network differ from that described in this plan. *Id.* at 7 n.***.

[40] *Ex Parte* Letter from E.C. Fletcher, Division Manager, AT&T, to Donna Searcy, Secretary, FCC, dated August 30, 1989, at 2. *See also Ex Parte* Letter from E.C. Fletcher, Division Manager, AT&T, to Donna Searcy, Secretary, FCC, dated August 23, 1989.

[41] *Id.*

[42] *Id.*

[43] *Ex Parte* Letter from Squire, Sanders & Dempsey, on behalf of IDCMA, to Donna R. Searcy, Secretary, FCC, dated August 31, 1989, at 2.

[44] *Id.*

[45] *Phase I Order,* 104 FCC 2d at 1020. *See also Phase I Reconsideration,* 2 FCC Rcd at 3042; *Phase I Further Reconsideration,* 3 FCC Rcd at 1135.

[46] *Bell Atlantic Gateway Order,* 3 FCC Rcd at 6046-47.

[47] *Pactel EMS Order,* 4 FCC Rcd at 1641.

[48] *Id.*

[49] *See* paras. 21-29, *infra*.

[50] AT&T lists 22 basic services that it will use in the provision of enhanced services through the ESC, although it does not specify which of these basic services will be used in each enhanced service offering. Given AT&T's assurances that all CEI parameters will be satisfied in the case of each listed basic service, we deem this level of specificity acceptable in the case of the present AT&T CEI plan. However, we do not hereby endorse application of this conclusion in the case of Bell Operating Company (BOC) CEI filings in light of the substantial differences in the interexchange and exchange telecommunications markets. *See generally Phase I Reconsideration,* 4 FCC Rcd at 3042.

[51] The nine CEI parameters involve: interface functionality; unbundling of basic services; resale; technical characteristics; minimization of transmission costs; installation, maintenance and repair; end user access; CEI availability; and recipients of CEI. *Phase I Order,* 104 FCC 2d at 1039-1043.

[52] *Id.* at 1039.

[53] IDCMA Comments at 7.

[54] IDCMA Comments at 8.

[55] *Id.*

[56] AT&T Reply at 7, n.***.

[57] *Id.*

[58] *Phase I Order,* 104 FCC 2d at 1040.

[59] *Id.* at n. 215.

[60] IDCMA Comments at 6-7.

[61] *Id.* at 7.

[62] AT&T further states that it will file an appropriate amendment to the Plan if it intends to subscribe to any AT&T tariffed offering that is not identified in Attachment 2 to the Plan. *Id.* at 7, n. *.

[63] The parties raised no substantive objections to AT&T's compliance with the following CEI parameters: technical characteristics; installation, maintenance and repair; end user access; CEI availability; and CEI recipients. Based on our examination of the Plan, we approve AT&T's compliance with these parameters. Our review of the Plan also satisfies us that AT&T has complied with the parameter concerning minimization of transmission costs. Lo-Ad does, however, argue that the reporting requirements concerning installation, maintenance and repair are inadequate. *See* para. 23, *infra,* for a discussion of this issue. We also address IDCMA's arguments about "physical collocation" and "virtual collocation" separately below. *See* paras. 24-25, *infra*.

[64] *See* Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298, *modified on recon.,* 2 FCC Rcd 6283 (1987), *petitions for further recon. pending.*

[65] IDCMA Comments at 8-9.

[66] *See* American Telephone and Telegraph, Plan for the Provision of Transaction Services, *Memorandum Opinion and Order,* DA 88-671, (released May 11, 1988).

[67] Lo-Ad requests that the Commission withhold approval of all AT&T CEI plans until the Commission's CPNI and nondiscrimination reporting requirements are strengthened. Lo-Ad Reply at 3-12. We discuss these matters in conjunction with Lo-Ad's allegations of anti-competitive conduct. *See* para. 26, *infra*.

[68] Lo-Ad Reply at 2.

[69] *Id.* at 3. Lo-Ad argues that the quarterly nondiscrimination reports required by the Commission are inadequate to deal with this problem because such reports only highlight anticompetitive conduct after the fact. Lo-Ad Reply at 7. Lo-Ad further states that since the data reported by AT&T are averaged from a "sampling" of information providers, a five-month delay, such as that experienced by Lo-Ad, may never appear in the reports to the Commission. *Id.* at 7-8. Thus, Lo-Ad suggests that the Commission require AT&T to list provisioning data for individual clients, and to include in its reports the date on which written requests for a service are first received, and the date on which installation is completed. *Id.* at 9. Lo-Ad requests that the Commission withhold approval of any AT&T CEI plan until more stringent reporting requirements are devised and implemented. *Id.*

[70] *Id.* at 10. Lo-Ad also complains that AT&T used the Multiquest presale application forms of Lo-Ad's customers to identify a potential base of customers for AT&T's own service bureau offerings. Id. at 10. Lo-Ad contends that approval of the Plan would institutionalize AT&T's unique ability to obtain and abuse CPNI. Thus, Lo-Ad requests that the Commission amend

its CPNI notice requirements for AT&T and withhold approval of any future AT&T CEI plan for enhanced services at least until AT&T includes in its CPNI Customer Notification a statement alerting ESPs that they are at risk of disclosing data regarding their customer bases to AT&T marketing personnel. *Id.* at 12.

[71] *Ex Parte* Letter from E.C. Fletcher, Division Manager, AT&T, to Donna Searcy, Secretary, FCC, dated June 26, 1989. Lo-Ad's reply comments are, at most, peripherally related to the matters raised in the comments of IDCMA and the TSPs.

[72] *Id.* at 2-11.

[73] TSP Comments at 2, 12-13.

[74] *Id.* at 6-11.

[75] AT&T Reply at 2-5.

[76] The *Phase I Order* declined to require actual collocation. 104 FCC 2d at 1038, 1047. The *Phase I Reconsideration* affirmed that holding and declined to require virtual collocation as well. 2 FCC Rcd at 3053.

[77] Ad Hoc Telecommunications Users Committee, Committee of Corporate Telecommunications Users, Telenet Communications Corp., and Transaction Service Providers Applications for Review of the Common Carrier Bureau's Approval of AT&T's Comparably Efficient Interconnection Plan for Transactions Services; Transaction Service Providers Request for Stay of the Common Carrier Bureau's Approval of AT&T's Comparably Efficient Interconnection Plan for Transaction Services, FCC 89-161 (released May 30, 1989) *(Transaction Service Affirmance Order), aff'g* American Telephone & Telegraph Co. Plan for the Provision of Transaction Services, 3 FCC Rcd 2702 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-95

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION

MEMORANDUM OPINION AND ORDER

Adopted: July 25, 1989; Released: July 26, 1989

By the Deputy Chief, Common Carrier Bureau:

1. On June 28, 1989, this Bureau released and Order in the above-captioned proceeding, directing the Communications Satellite Corporation (Comsat) to use a specified methodology to calculate the allocation of its refund obligation established in CC Docket Nos. 80-634 and 85-568.[1] The *Allocation Order* directed Comsat to use its month-by-month billing records for the period in question, using the calculation methodology proposed by TRT Telecommunications Corporation. *Allocation Order,* 4 FCC Rcd at 1-2. We also specified a filing date of July 27, 1989, for Comsat's calculations, and a comment date of August 11, 1989. *Id.* at 2. Comsat has filed a motion for extension of time requesting that it be allowed to file its calculations on October 25, 1989. Comsat Motion for Extension of Time, filed July 20, 1989. No oppositions to this motion have been filed.

2. Comsat states that it has begun compiling the information we requested, and will complete that process shortly. Rather than filing those calculations publicly, however, Comsat requests a ninety-day extension so that it may provide each customer with the data pertinent to that customer, review the data with that customer, and resolve any questions or inadvertent discrepancies. Comsat suggests that this will reduce the time and Commission resources that would otherwise be expended to resolve disputes or discrepancies between Comsat and its customers concerning the refund amounts. Comsat states that this extension will thus expedite the ultimate resolution of this proceeding, and will assure that the figures thus submitted to the Commission for public comment are accurate. Comsat further notes that customers will not be prejudiced by the grant of the extension, since the refund amount has been escrowed and interest continues to accrue.

3. While we appreciate Comsat's arguments, we are also interested in bringing this proceeding to a conclusion as expeditiously as possible, so that Comsat's customers may receive the benefit of the ordered refund. In view of this objective, we believe that the extension requested by Comsat is excessive.[2] We are accordingly extending until **August 15, 1989,** the filing date for Comsat's allocation figures, and until **August 30, 1989,** the date for comments.

4. Accordingly, IT IS ORDERED that the Communications Satellite Corporation motion for extension of time IS GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

FOOTNOTES

[1] Communications Satellite Corporation, Memorandum Opinion and Order, CC Docket 88-95, 4 FCC Rcd 5230 (Com.Car.Bur. 1989) *(Allocation Order).*

[2] Comsat asserts its belief that this proceeding is not subject to the statutory deadlines of Public Law 100-594, 102 Stat. 3023, codified at 47 U.S.C. §204(a)(2)(B). Because our grant of a more limited extension is unlikely to postpone significantly our final resolution of this proceeding, we need not reach this issue.

 ☆ U.S. GOVERNMENT PRINTING OFFICE: 1989— 261 - 072 /20000